TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 178.

JOHN W. DUKE, MAYOR, AND WILLIAM T. WALKER ET AL., COUNCILMEN OF THE CITY OF GUTHRIE, PLAINTIFFS IN ERROR,

vs.

C. W. TURNER AND JAMES A. KIRKWOOD.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

FILED JANUARY 6, 1906.

(20,036.)

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1 THE UNITED STATES OF AMERICA, *Territory of Oklahoma, ss:*

To C. W. Turner and James A. Kirkwood, Greeting:

You are hereby cited and admonished to be and appear at a session of the Supreme Court of the United States of America to be holden at the City of Washington on the 8th day of January, 1906, next pursuant to a writ of error filed in the Clerk's Office of the Supreme Court of the Territory of Oklahoma, wherein John W. Duke, Mayor and William T. Walker, Eugene J. Blackman, A. Edward Johnson, William S. Wells, John Towers, Almont C. Hixon, William T. Moorman, John L. Calvert, Richard H. Knight and John W. Capers, Councilmen of the City of Guthrie, Oklahoma, successors in office of C. M. Barnes, as Mayor, and George Green, W. A. Packer, W. S. Spencer, E. E. Tallman, E. L. Hirschi, J. E. Peterson, J. W. McBrine, J. E. Douglas, G. N. Perkins and A. P. Portwood, as Councilmen of the City of Guthrie, are plaintiffs in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said predecessors in office of said plaintiffs in error as in the said writ of error mentioned should not be corrected, and speedy justice be done to the parties in that behalf.

Witness the Honorable Jno. H. Burford, Chief Justice of the Supreme Court of the Territory of Oklahoma, this 9th day of December in the year of our Lord one thousand nine hundred and five, and of the Independence of the United States of America the one hundred thirty.

[Seal Supreme Court, Territory of Oklahoma.]

JNO. H. BURFORD,
Chief Justice of the Supreme Court
of the Territory of Oklahoma.

Attest:
BENJ. F. HEGLER,
Clerk of the Supreme Court
of the Territory of Oklahoma.

I hereby, on this 11th day of Dec., 1905, accept due personal service of this citation on behalf of C. W. Turner and James A. Kirkwood, defendants in error.

DALE & BIERER,
Attorneys for Defendants in Error.

[Endorsed:] 1537. John W. Duke, Mayor, *et al. vs.* C. W. Turner and James A. Kirkwood. Citation and service thereof. Filed Dec. 15, 1905. Benj. F. Hegler, Clerk Supreme Court, by —— —— Deputy.

2 In the Supreme Court of the Territory of Oklahoma. At Law.

JOHN W. DUKE, Mayor, and WILLIAM T. WALKER, EUGENE J. BLACKMAN, A. EDWARD JOHNSON, WILLIAM S. WELLS, JOHN TOWERS, ALMONT C. HIXON, WILLIAM T. MOORMAN, JOHN L. CALVERT, RICHARD H. KNIGHT, and JOHN W. CAPERS, Councilmen of the City of Guthrie, Plaintiffs in Error,

vs.

C. W. TURNER and JAMES A. KIRKWOOD, Defendants in Error.

Petition for Writ of Error.

Come now John W. Duke, Mayor, and William T. Walker, Eugene J. Blackman, A. Edward Johnson, William S. Wells, John Towers, Almont C. Hixon, William T. Moorman, John L. Calvert, Richard H. Knight and John W. Capers, Councilmen of the City of Guthrie, successors in office to C. M. Barnes, Mayor, George Green, W. A. Packer, W. S. Spencer, E. E. Tallman, E. L. Hirschi, J. E. Peterson, J. W. McBrine, J. E. Douglas, G. N. Perkins and A. P. Portwood, Councilmen of the City of Guthrie, and say that on the 1st of September, 1904, this court rendered judgment herein in favor of the defendants in error and against the predecessors in office of the plaintiffs in error, denying the petition in error of the predecessors of the plaintiffs in error for a reversal of the judgment of the District Court of Logan County and Territory of Oklahoma complained of, and affirming the said judgment at the cost of the predecessors in office of said plaintiffs in error, and wherein in this court the plaintiffs in error allege manifest error was committed to their prejudice; all of which will appear more in detail from the assignment of errors which is filed with this petition.

Wherefore, petitioners pray that a writ of error may issue in their behalf to the Supreme Court of said Territory, and that a transcript of the proceedings, record and papers in the cause be duly authenti-

3 cated and sent to the Supreme Court of the United States for its revision, and plaintiffs in error in this behalf also submit herewith the affidavit of Abraham H. Huston, one of the attorneys for said plaintiffs in error, showing the amount or value in controversy in this case, exclusive of costs, to exceed the sum or amount of Five Thousand ($5,000) Dollars.

L. E. PAYSON,
JAMES HEPBURN, AND
LAWRENCE & HUSTON,
Attorneys for Plaintiffs in Error.

Endorsed: No. 1537—John W. Duke, Mayor, *et al.*, plaintiffs in error, *vs.* C. W. Turner and James A. Kirkwood, defendants in error. Petition for writ of error.—Filed Dec. 9, 1905. Benj. F. Hegler, Clerk Supreme Court.

4 In the Supreme Court of the Territory of Oklahoma. At Law.

JOHN W. DUKE, Mayor, and WILLIAM T. WALKER, EUGENE J. BLACKMAN, A. EDWARD JOHNSON, WILLIAM S. WELLS, JOHN TOWERS, ALMONT C. HIXON, WILLIAM T. MOORMAN, JOHN L. CALVERT, RICHARD H. KNIGHT, and JOHN W. CAPERS, Councilmen of the City of Guthrie, Plaintiffs in Error,

vs.

C. W. TURNER and JAMES A. KIRKWOOD, Defendants in Error.

Assignment of Errors.

The plaintiffs in error in this action, in connection with their petition for a writ of error, make the following assignment of errors which they aver occurred upon the trial of the cause, to-wit:

1. That the court erred in affirming the judgment of the court below.

2. That the court erred in adjudging and awarding a peremptory writ of mandamus against the predecessors in office of plaintiffs in error.

3. That said judgment and peremptory writ of mandamus is contrary to law.

4. That said judgment and peremptory writ of mandamus is contrary to the agreed facts.

5. That said court erred in holding that said action in mandamus was not barred by the Statute of Limitations, notwithstanding said action had accrued more than three years and more than five years before the commencement of said action.

6. That said court erred in holding and deciding that the Statute of Limitations never commences to run against an action upon a municipal warrant or an action in mandamus to compel a levy to pay a municipal warrant, until there is money in the Treas-
5 ury to pay the same, notwithstanding when such action might have accrued.

7. That said court erred in not holding and deciding that said action in mandamus accrued not later than the 7th day of December 1895, when the predecessor- in interest of Turner and Kirkwood, plaintiffs below commenced an action in mandamus, identical with this in the said District Court of Logan County.

8. That said court erred in holding and deciding absolutely and without qualification that the Statute of Limitations does not run in favor of a municipal corporation upon outstanding warrants until the corporation has provided a fund with which to pay the same.

9. That said court erred in not holding and deciding the true rule to be that a cause of action does not accrue against a municipal corporation upon its warrants, until the money for the payment of the warrants is collected, or time sufficient for the collection of the money has elapsed.

10. That said court erred in considering and assuming the war-

rants in question in this case to represent an indebtedness of the City of Guthrie.

L. E. PAYSON,
JAMES HEPBURN, AND
LAWRENCE & HUSTON,
Attorneys for Plaintiffs in Error.

[Endorsed:] No. 1537. John W. Duke, Mayor, *et al.*, Plaintiffs in error, *vs.* C. W. Turner and James A. Kirkwood, Defendants in error. Assignments of Error. Filed Dec. 9, 1905. Benj. F. Hegler, Clerk Supreme Court, by —— ——, Deputy.

6 In the Supreme Court of the Territory of Oklahoma.

JOHN W. DUKE, Mayor, and WILLIAM T. WALKER, EUGENE J. BLACKMAN, A. EDWARD JOHNSON, WILLIAM S. WELLS, JOHN TOWERS, ALMONT C. HIXON, WILLIAM T. MOORMAN, JOHN L. CALVERT, RICHARD H. KNIGHT, and JOHN W. CAPERS, Councilmen of the City of Guthrie, Plaintiffs in Error,

vs.

C. W. TURNER and JAMES A. KIRKWOOD, Defendants in Error.

TERRITORY OF OKLAHOMA, *County of Logan, ss:*

Abraham H. Huston, being first duly sworn, on his oath deposes and says that he is one of the attorneys for plaintiffs in error in the above entitled case; that he is familiar with the controversy in this case and knows that the amount at issue therein and involved therein, and the amount in controversy therein to exceed, exclusive of costs, the sum of Five Thousand ($5,000.00) Dollars.

A. H. HUSTON.

Subscribed and sworn to before me this 9 day of December 1905.

[SEAL.] BENJ. F. HEGLER.

Endorsed: No. 1537—John W. Duke Mayor *et al.*, plaintiffs in error, *vs.* C. W. Turner and James A. Kirkwood, defendants in error. Affidavit as to amount in controversy. Filed Dec. 9, 1905. Benj. F. Hegler, Clerk Supreme Court.

7 In the Supreme Court of the Territory of Oklahoma.

JOHN W. DUKE, Mayor, and WILLIAM T. WALKER, EUGENE J. BLACKMAN, A. EDWARD JOHNSON, WILLIAM S. WELLS, JOHN TOWERS, ALMONT C. HIXON, WILLIAM T. MOORMAN, JOHN L. CALVERT, RICHARD H. KNIGHT, and JOHN W. CAPERS, Councilmen of the City of Guthrie, Plaintiffs in Error,

vs.

C. W. TURNER and JAMES A. KIRKWOOD, Defendants in Error.

Order Allowing Writ of Error.

Now on this 9th day of December, A. D. 1905, is presented to me the undersigned, Chief Justice of the Supreme Court of the Territory of Oklahoma, the petition of the above named plaintiffs in error for a writ of error; which said writ of error is by me granted, and the plaintiffs in error desiring that their writ of error shall operate as a supersedeas, it is by me ordered that said writ of error shall operate as a supersedeas, upon the due execution of a supersedeas bond with sufficient sureties, within twenty days from this date in the penal sum of $1000; to be approved by the Clerk of the Supreme Court of the Territory of Oklahoma.

JNO. H. BURFORD,
Chief Justice of the Territory of Oklahoma.

Attest:
BENJ. F. HEGLER,
[SEAL.] *Clerk Supreme Court.*

Endorsed: No. 1537—John W. Duke, Mayor, *et al.*, plaintiffs in error, *vs.* C. W. Turner and James A. Kirkwood, defendants in error. Order allowing writ of error.—Filed Dec. 9, 1905. Benj. F. Hegler, Clerk Supreme Court.

8 In the Supreme Court of the Territory of Oklahoma.

JOHN W. DUKE, Mayor, and WILLIAM T. WALKER, EUGENE J. BLACKMAN, A. EDWARD JOHNSON, WILLIAM S. WELLS, JOHN TOWERS, ALMONT C. HIXON, WILLIAM T. MOORMAN, JOHN L. CALVERT, RICHARD H. KNIGHT, and JOHN W. CAPERS, Councilmen of the City of Guthrie, Plaintiffs in Error,

vs.

C. W. TURNER and JAMES A. KIRKWOOD, Defendants in Error.

THE UNITED STATES OF AMERICA, *Territory of Oklahoma, ss:*

The President of the United States of America to the Honorable Judges and Clerk of the Supreme Court of the Territory of Oklahoma, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in said Supreme Court of the Territory of Oklahoma, before you, being the highest court of law and equity of the said Territory in which a decision can be had in the said suit between John W. Duke, Mayor, and William T. Walker,

Eugene J. Blackman, A. Edward Johnson, William S. Wells, John Towers, Almont C. Hixon, William T. Moorman, John L. Calvert, Richard H. Knight and John W. Capers, Councilmen of the City of Guthrie, as plaintiffs in error in the Supreme Court of said Territory, and C. W. Turner and James A. Kirkwood, as defendants in error in the Supreme Court of said Territory, wherein a judgment was rendered in said cause in favor of said defendants in error and against C. M. Barnes, Mayor, and George Green, W. A. Packer, W. S. Spencer, E. E. Tallman, E. L. Hirschi, J. E. Peterson, J. W. McBrine, J. E. Douglas, G. N. Perkins and A. P. Portwood, Councilmen of the City of Guthrie, predecessors in office of said plaintiffs in error, affirming the judgment of the court below allowing a peremptory writ of mandamus against the said predecessors in office of said plaintiffs in error, and requiring them to make a
9 certain tax levy for the payment of certain warrants and affirming the judgment of the lower court in favor of said defendants in error at the cost of said plaintiffs in error, and wherein the value of the property and the amount in controversy between said parties to said action, exclusive of costs, as shown by the affidavit of Mr. Abraham H. Huston, exceeded and exceeds the sum of Five Thousand ($5,000.00) Dollars it appears therein that manifest error has happened to the great damage of said plaintiffs in error, John W. Duke, Mayor, and William T. Walker, Eugene J. Blackman, A. Edward Johnson, William S. Wells, John Towers, Almont C. Hixon, William T. Moorman, John L. Calvert, Richard H. Knight and John W. Capers, Councilmen of the City of Guthrie, as by their complaint and assignment of errors appears, we, being willing that the error, if any hath been committed, should be duly and speedily corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly you send the copy of the record and proceedings aforesaid, with all things concerning the same, duly authenticated and verified, to the Supreme Court of the United States, together with this writ, so that *we* have the same at Washington, at the said Supreme Court, within thirty days from the date hereof, *with* said record of proceedings aforesaid being inspected by the said Supreme Court, it may cause further to be done therein to correct that error what of *writ* and according to the laws and customs of the United States should be done.

Witness the Honorable John H. Burford, Chief Justice of the Supreme Court of the Territory of Oklahoma, this 9 day of December, in the year of our Lord one thousand nine hundred and five, and in the year of the Independence of the United States of America the one hundred thirtieth.

[Seal Supreme Court, Territory of Oklahoma.]

BENJ. F. HEGLER,
Clerk of the Supreme Court of the Territory of Oklahoma.

Allowed by
JNO. H. BURFORD,
Chief Justice of the Supreme Court of the Territory of Oklahoma.

[Endorsed:] No. 1537 John W. Duke, Mayor, *et al.*, Plaintiffs in error, *vs.* C. W. Turner and James A. Kirkwood, Defendants in error. Writ of Error. Filed Dec. 9 1905 Benj. F. Hegler, Clerk Supreme Court. By —— —— Deputy.

10 In the Supreme Court of the Territory of Oklahoma.

JOHN W. DUKE, Mayor, and WILLIAM T. WALKER, EUGENE J. BLACKMAN, A. EDWARD JOHNSON, WILLIAM S. WELLS, JOHN TOWERS, ALMONT C. HIXON, WILLIAM T. MOORMAN, JOHN L. CALVERT, RICHARD H. KNIGHT, and JOHN W. CAPERS, Councilmen of the City of Guthrie, Plaintiffs in Error,

vs.

C. W. TURNER and JAMES A. KIRKWOOD, Defendants in Error.

Know all men by these presents, That we John W. Duke, Mayor, and William T. Walker, Eugene J. Blackman, A. Edward Johnson, William S. Wells, John Towers, Almont C. Hixon, William T. Moorman, John L. Calvert, Richard H. Knight and John W. Capers, Councilmen of the City of Guthrie, as principal, and the Columbia Bank and Trust Company, a corporation, as surety, are held and firmly bound unto C. W. Turner and James A. Kirkwood in the penal sum of One Thousand ($1000.00) Dollars, lawful money of the United States, for the payment of which, well and truly to be made, we bind ourselves, our successors and assigns jointly and severally, firmly by these presents.

Witness our hands and seals this 18th day of December, 1905.

The condition of the above obligation is such that,

Whereas, the said C. W. Turner and James A. Kirkwood did on the 1st day of September, 1903, at a session of the Supreme Court of the Territory of Oklahoma, holden at the City of Guthrie in said Territory, in a suit pending in said Court between C. M. Barnes, Mayor, and George Green, W. A. Packer, W. S. Spencer, E. E. Tallman, E. L. Hirchi[illegible]. E. Peterson, J. W. McBrine, J. E. Douglas, G. N. Perkins and A. P. Portwood Councilmen of the City of Guthrie, the predecessors in office of said John W. Duke, Mayor, and William T. Walker, Eugene J. Blackman, A. Edward Johnson, William S. Wells, John Towers, Almont C. Hixon, William T. Moorman, John L. Calvert, Richard H. Knight and John W. Capers, Councilmen of the City of Guthrie, as plaintiffs in
11 error and C. W. Turner and James A. Kirkwood, as defendants in error, there was a judgment rendered against the said predecessors in office of said plaintiffs in error and in favor of said defendants in error, affirming a certain judgment of the District Court of Logan County, Oklahoma Territory heretofore pending in said District Court, wherein said defendants in error were plaintiffs, and the said predecessors in office of said plaintiffs in error were defendants, requiring the said predecessors in office of said plaintiffs in error, to make a certain tax levy upon all taxable property in the City of Guthrie and Consolidated School District, for the purpose of paying seventeen certain warrants, ag-

gregating the sum of $4332.42, together with interest thereon, and said plaintiffs in error having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Supreme Court of the Territory of Oklahoma, and citation directed to said defendants in error citing and admonishing them to be and appear at a session of the Supreme Court to be holden at the City of Washington.

12 & 13 Now, therefore, if the said Mayor and Councilmen and their successors in office shall duly prosecute said writ of error with effect and shall answer all damages and costs including interest and other charges and do what shall be required of they by the judgment of said court and pay the costs rendered against it, in case the said judgment shall be affirmed in said Supreme Court, then the above obligation to be void; otherwise to remain in full force and effect.

JOHN W. DUKE,
WILLIAM T. WALKER,
EUGENE J. BLACKMAN,
A. EDWARD JOHNSON,
WILLIAM S. WELLS,
JOHN TOWERS,
ALMONT C. HIXON,
WILLIAM T. MOORMAN,
JOHN L. CALVERT,
RICHARD H. KNIGHT,
JOHN W. CAPERS,
By JAMES HEPBURN, *Attorney.*
THE COLUMBIA BANK AND TRUST CO.,
[SEAL.] By C. J. PRATT, *V. President, Surety.*

Attest:
W. E. HODGES, *Secretary.*

Approved this Dec. 21, 1905.
BENJ. F. HEGLER,
[SEAL.] *Clerk Supreme Court.*

Endorsed: No. 1537.—In the Supreme Court of Oklahoma Territory. John W. Duke, Mayor, *et al.*, *vs.* Turner & Kirkwood,—Bond. Approved this 21st December, 1905, Benj. F. Hegler, Clerk Supreme Court.—Filed Dec. 21, 1905. Benj. F. Hegler, Clerk Supreme Court.

14 In the Supreme Court of the Territory of Oklahoma.

No. 1537.

C. M. BARNES, Mayor; GEORGE GREEN, W. A. PACKER, W. S. SPENCER, E. E. TALLMAN, E. L. HIRSCHI, J. E. PETERSON, J. W. MCBRINE, J. E. DOUGLAS, J. N. PERKINS and A. P. PORTWOOD, Councilmen of the City of Guthrie, Logan County, Oklahoma Territory, Plaintiffs in Error,

vs.

C. W. TURNER and JAMES A. KIRKWOOD, Defendants in Error.

Petition in Error.

The plaintiffs in error complain for that on the 23rd day of December, 1903, in the District Court of Logan County at the November term thereof, in an action therein pending wherein these defendants in error were plaintiffs, and these plaintiffs in error were defendants, a final judgment was rendered by said court in favor of said plaintiffs and against said defendants awarding and allowing a peremptory writ of mandamus against said defendants requiring and compelling them as Mayor and Councilmen of the City of Guthrie to levy a certain tax on certain property for the payment of certain warrants, which said judgment and peremptory writ of mandamus and all of the proceedings relating thereto had and done in the said District Court of Logan County, Oklahoma Territory more fully appears in the case made attached hereto, marked Exhibit "A" and made a part of this petition in error.

And the plaintiffs in error allege that there are many and manifest errors appearing in the record of the proceedings of said cause in said District Court, and plaintiffs in error allege the following specifications of error:

15 1. That said court erred in overruling the demurrer of plaintiffs in error to the petition of the defendants in error.

2. That said court erred in sustaining the demurrer of said defendants in error to the answer and return of said plaintiffs in error.

3. That said court erred in rendering judgment against said plaintiffs in error and in favor of said defendants in error.

4. That said court erred in awarding a peremptory writ of mandamus against plaintiffs in error.

5. That said judgment and peremptory writ of mandamus is contrary to the evidence.

6. That said judgment and peremptory writ of mandamus is contrary to the law.

7. That said court erred in overruling the plaintiffs' in error motion for a new trial.

8. That said court erred in holding that said action in mandamus was not barred by the statute of limitations.

Wherefore, Plaintiffs in error pray that the judgment and peremptory writ of mandamus rendered and awarded in said District

Court against said plaintiffs in error in favor of said defendants in error be set aside and held for naught, and that said cause be reversed and remanded to said District Court with directions to enter judgment in favor of the plaintiffs in error for their costs.

JAMES HEPBURN,
City Attorney.
LAWRENCE & HUSTON,
Attorneys for Plaintiffs in Error.

Filed May 25, 1904,
BENJ. F. HEGLER,
Clerk Supreme Court.

16 Filed May 25, 1904. Benj. F. Hegler, Clerk Supreme Court.

In the District Court of Logan County, Oklahoma Territory.

C. W. TURNER and JAMES A. KIRKWOOD, Plaintiffs,
vs.
C. M. BARNES, Mayor of the City of Guthrie; GEORGE GREEN, W. A. PACKER, W. S. SPENCER, E. E. TALLMAN, E. L. HIRSCHI, J. E. PETERSON, J. W. MCBRINE, J. E. DOUGLAS, J. N. PERKINS and A. P. PORTWOOD, Councilmen of the City of Guthrie, Logan County, Oklahoma Territory, Defendants.

Case Made.

Be it remembered that on the 23rd day of July, 1903, the plaintiffs, C. W. Turner and James A. Kirkwood, filed their petition in the District Court of Logan County, Oklahoma Territory, praying that a writ of mandamus issue directed to the defendants, C. M. Barnes, Mayor of the City of Guthrie, George Green, W. A. Packer, W. S. Spencer, E. E. Tallman, E. L. Hirschi, J. E. Peterson, J. W. McBrine, J. E. Douglas, J. N. Perkins and A. P. Portwood, Councilmen of the City of Guthrie, Logan County, Oklahoma Territory, requiring them to meet and levy tax upon certain sub-divisions of the City of Guthrie to create a fund to pay certain warrants, which said petition is in words and figures as follows:

17 In the District Court of Logan County, Oklahoma Territory.

C. W. TURNER and JAMES A. KIRKWOOD, Plaintiffs,

vs.

C. M. BARNES, Mayor of the City of Guthrie; GEORGE GREEN, W. A. PACKER, W. S. SPENCER, E. E. TALLMAN, E. L. HIRSCHI, J. E. PETERSON, J. W. MCBRINE, J. E. DOUGLAS, J. N. PERKINS and A. P. PORTWOOD, Councilmen of the City of Guthrie, Logan County, Oklahoma Territory, Defendants.

Petition.

Your relators for a cause of action against the defendants and each of them, show:

1. That C. M. Barnes, defendant above named, is the duly elected, qualified and acting Mayor of the City of Guthrie, Logan County, Oklahoma Territory, and that George Green, W. A. Packer, W. S. Spencer, E. E. Tallman, E. L. Hirschi, J. E. Peterson, J. W. McBrine, J. E. Douglas, J. N. Perkins, and A. P. Portwood, defendants above named, are the duly elected, qualified and acting members of the city council of said city, and under the law it is made the duty of said defendants, acting as officers of the said city of Guthrie, to make tax levies upon the property in said city, both real and personal, to pay the debts due and owing by said city and the various subdivisions thereof.

Second. That the present city of Guthrie, a municipal corporation, is the legal successor to the city governments of Guthrie, East Guthrie, West Guthrie, and Capitol Hill, said last named cities having been consolidated into the present city of Guthrie; that prior to such consolidation, they were managed by separate governments.

Third. That prior to December 25th, 1890, while the said separate city governments of Guthrie, East Guthrie, West Guthrie, and Capitol Hill were existing as separate city governments, they were consolidated for school purposes into one school district, which
18 was denominated "Consolidated School District of Guthrie, East Guthrie, West Guthrie, and Capitol Hill."

Fourth. That for the purpose of carrying on the said city governments of Guthrie, East Guthrie, West Guthrie, and Capitol Hill, and the Consolidated School District, of said several cities, various debts were created by said cities and School District, which said cities and School District obligated themselves to pay.

Fifth. That, to wit: On December 25th, 1890, the legislature of the Territory of Oklahoma passed an act entitled "An act for the Purpose of Providing for the Allowance and Payment of the Indebtedness Heretofore Created by the People and Cities of Guthrie, East Guthrie, West Guthrie, and Capitol Hill, Now Consolidated into the Village of Guthrie," wherein it was provided among other things, that the District Judge of Logan County, should appoint three (3) persons to act as a Commission to inquire into and pass upon all claims and demands theretofore issued by the city gov-

ernments mentioned in the caption of the said act; that the owners and holders of script, warrants, or other evidence of indebtedness theretofore issued by said city governments, should present their claims to the commissioners and if the said commissioners should find that said claims were of the character mentioned in said act, the same should be allowed and thereafter certified to the District Court for approval or disapproval, and that all claims allowed and approved by the district judge should be certified to the mayor and council of the village of Guthrie, now the City of Guthrie, who were directed to issue warrants upon the village and people of the village, to the holders and owners thereof in installments, to be paid in one (1) two (2) three (3) four (4) and five (5) years and to bear interest at the rate of six per cent. (6 %) per annum from the date of the allowance of the commission. And it was further pro-
19 vided in said act that said mayor and city council should levy a tax upon the property of the residents of said villages to pay all warrants so allowed and approved and that each of said cities should be liable for and taxable for the amount of indebtedness created by them, including the school boards of said cities.

Sixth. That on June 3rd, 1891, said commissioners duly allowed and certified certain claims in favor of Harper S. Cunningham, as receiver of the National Bank of Guthrie, in various and sundry sums, which claims were duly certified by said commissioners to the Judge of the District Court of Logan County, as by law provided, and by said Judge duly approved, allowed and certified to the Mayor and Council of the then styled village of Guthrie, with instructions to issue warrants therefor and, on the 1st day of July, 1893, said Mayor and city council in part payment of said claims so allowed as aforesaid, issued the warrant of the city of Guthrie, No. 1, dated July 1st, 1893, in the sum of Two Hundred Seventy-three and 77/100 Dollars ($273.77) with interest thereon at the rate of six per cent. (6 %) per annum from June 3rd, 1891, a true copy of said warrant is hereto attached, made part hereof, and marked No. 1.

Seventh. Your relators further state that for a valuable consideration, after said warrant was issued as above set forth, they purchased the same and are now the owners and holders of said warrant.

Eighth. That by reason of the facts herein set out, it became and was the duty of the mayor and city council to levy a tax each year, for the payment of said warrant, and interest thereon, as by law provided, as the same became due and payable, in all of which par-
ticulars the said mayor and city council have wholly failed.
20–51 Ninth. That the plaintiffs herein have made demands at various times for the levy of the tax for the purpose of paying said warrant indebtedness and on, to wit: July 16th, 1903, at a meeting of the mayor and city council in the city of Guthrie, at a time when said mayor and council had under consideration the levying of taxes to pay the indebtedness of the City of Guthrie, and on the various former sub-divisions thereof, which meeting was being held as an adjourned meeting for the purpose of making the annual levy of taxes, your relators again demanded a levy of taxes for the purpose of meeting the warrant indebtedness herein

set forth and notwithstanding their duty in the premises, said mayor and council refused to make such levy.

Tenth. That there is now due upon said warrant the sum named therein together with interest at the rate of six per cent. (6 %) per annum from June 3rd, 1891.

Eleventh. And your relators further state that at no time since the issuance of said warrant has the mayor and council of the city of Guthrie acting for and on behalf of the former subdivisions thereof, levied a tax for the purpose of meeting said warrant indebtedness and of meeting the demand created by the obligation as under the law they were bound to do. That said warrant indebtedness is an indebtedness which should be met by levy of taxes against that sub-division of the city of Guthrie known as Guthrie. And your relators aver that they have no other adequate remedy at law.

Wherefore, your relators pray that a writ of mandamus issue directed to the defendants herein named and each of them requiring them to at once meet and levy a tax upon that sub-division of the city of Guthrie herein designated as Guthrie, which will create a fund sufficient to meet the obligations due by virtue of the issuance of said warrant.

* * * * * * *

52 For a further and seventeenth cause of action your relators allege that they make the first, second, third, fourth and fifth paragraphs of their First cause of action a part of this their seventeenth cause of action as fully as if the same were set forth and repleaded herein; and further allege, that, on June 3rd, said commissioners duly allowed and certified certain claims in favor of Harper S. Cunningham, as receiver of the National Bank of Guthrie, in various and sundry sums, which claims were duly certified by said commissioners to the judge of the district court of Logan County, Oklahoma Territory, as by law provided, and by said judge duly approved, allowed and certified to the mayor and council of the then styled village of Guthrie, with instructions to issue warrants therefor, and, on the first day of July, 1893, said mayor and city council in part payment of said claims as aforesaid, issued a warrant to the city of Guthrie, No. 40, dated July 1st, 1893, in the sum of eleven and 22/100 dollars ($11.22), with interest thereon at the rate of six per cent. (6 %) per annum from June 3rd, 1891, a true copy of which said warrant is hereto attached, made a part hereof, and marked No. 40.

Seventh. Your relators further state that for a valuable consideration, after said warrant was issued as above set forth, they purchased the same and are now the owners and holders of said warrant.

Eighth. That by reason of the facts herein set out, it became and was the duty of the mayor and city council to levy a tax each year, for the payment of said warrant, and interest thereon, as by law provided, as the same became due and payable, in all of which particulars the said mayor and city council have wholly failed.

53 Ninth. That the plaintiffs herein have made demands at various times for the levy of the tax for the purpose of paying

said warrant indebtedness and on, to wit: July 16th, 1903, at a meeting of the mayor and city council in the city of Guthrie, at a time when said mayor and council had under consideration the levying of taxes to pay the indebtedness of the city of Guthrie, and on the various former sub-divisions thereof, which meeting was being held as an adjourned meeting for the purpose of making the annual levy of taxes, your relators again demanded a levy of taxes for the purpose of meeting the warrant indebtedness herein set forth and notwithstanding their duty in the premises, said mayor and council refused to make such levy.

Tenth. That there is now due upon said warrant the sum named therein together with interest at the rate of six per cent. (6 %) per annum from June 3rd, 1891.

Eleventh. And your relators further state that at no time since the issuance of said warrant has the mayor and council of the city of Guthrie, acting for and on behalf of the former sub-divisions thereof, levied a tax for the purpose of meeting said warrant indebtedness and of meeting the demand created by the obligation as under the law they were bound to do. That said warrant indebtedness is an indebtedness which should be met by levy of taxes against that sub-division of the city of Guthrie known as Guthrie. And your relators aver that they have no other adequate remedy at law.

Wherefore your relators pray that a writ of mandamus issue directed to the defendants herein named and each of them requiring them to at once meet and levy a tax upon that sub-division of the city of Guthrie herein designated as Guthrie, which will create a fund sufficient to meet the obligation due by virtue of the issuance of said warrant.

DALE & BIERER,
Att'ys for Relators.

54 TERRITORY OF OKLAHOMA, *County of Logan, ss:*

Frank Dale, being duly sworn, upon his oath states:

That he is a member of the firm of Dale & Bierer, lawyers, who are attorneys for the plaintiff named in the above and foregoing petition; that he makes this affidavit for and on behalf of the plaintiffs, said plaintiffs being absent from the county of Logan; that he is well acquainted with the facts set forth in the foregoing petition, and knows the allegations contained therein and that the same are true.

FRANK DALE.

Subscribed and sworn to before me this 23 day of July, A. D. 1903.

T. A. NEAL,
Notary Public.

[DISTRICT COURT SEAL.]

My Commission expires —— —, 190–.

55–70 *Warrant of the City of Guthrie, Oklahoma Territory.*

$273.77. No. 1.

Treasurer of the City of Guthrie:

One year after date pay to the order of Harper S. Cunningham, Receiver National Bank Guthrie, the sum of Two hundred and seventy-three 77/100 Dollars, with interest thereon at the rate of six per centum per annum, from June 3rd, 1891, from any moneys which shall arise from special levy for the payment of City Warrants issued under the provisions of Chapter No. 14, of the Statutes of Oklahoma, providing for the payment of indebtedness of the provisional governments of the Cities of Guthrie, East Guthrie, West Guthrie, and Capitol Hill, upon the sub-division of Guthrie known as Guthrie.

By order of the City Council, July 1, 1893.

A. M. McELHINNEY, *Mayor.*

Attest:

E. G. MILLIKAN,
City Clerk.

[Seal City of Guthrie, Oklahoma.]

Endorsed on back: Harper S. Cunningham, Rec.

* * * * * * *

71 *Warrant of the City of Guthrie, Oklahoma Territory.*

$11.22. No. 40.

Treasurer of the City of Guthrie:

Five years after date pay to the order of R. H. Smithwick the sum of Eleven and 22/100 Dollars, with interest thereon at the rate of six per centum per annum, from June 3rd, 1891, from any moneys which shall arise from special levy for the payment of City Warrants under the provisions of Chapter No. 14, of the Statutes of Oklahoma, providing for the payment of indebtedness of the provisional governments of the Cities of Guthrie, East Guthrie, West Guthrie, and Capitol Hill, upon the sub-division of Guthrie known as Guthrie.

By order of the City Council, July 1, 1893.

A. M. McELHINNEY, *Mayor.*

Attest:

E. G. MILLIKAN,
City Clerk.

[Seal City of Guthrie, Oklahoma.]

Endorsed on back: R. H. Smithwick.

72 That thereafter, to wit, on the 23rd day of July, 1903, an alternative writ of mandamus was allowed in said court in said action which said alternative writ is in the words and figures as follows, to wit:

In the District Court of Logan County, Oklahoma Territory.

C. W. TURNER and JAMES A. KIRKWOOD, Plaintiffs,

vs.

C. M. BARNES, Mayor of the City of Guthrie; GEORGE GREEN, W. A. PACKER, W. S. SPENCER, E. E. TALLMAN, E. L. HIRSCHI, J. E. PETERSON, J. W. MCBRINE, J. E. DOUGLAS, J. N. PERKINS, and A. P. PORTWOOD, Councilmen of the City of Guthrie, Logan County, Oklahoma Territory, Defendants.

Mandamus Writ.

Whereas it has been shown to me, the undersigned judge of the District Court of Logan County, Oklahoma Territory, by the petition of the plaintiffs above named:

1. That C. M. Barnes, defendant above named, is the duly elected, qualified and acting Mayor of the city of Guthrie, Logan County, Oklahoma Territory, and that George Green, W. A. Packer, W. S. Spencer, E. E. Tallman, E. L. Hirschi, J. E. Peterson, J. W. McBrine, J. E. Douglas, J. N. Perkins, and A. P. Portwood, defendants above named, are the duly elected, qualified and acting members of the city council of said city, and under the law it is made the duty of said defendants, acting as officers of the said city of Guthrie, to make tax levies upon the property in said city, both real and personal, to pay the debts due and owing by said city and the various sub-divisions thereof.

73 Second. That the present city of Guthrie, a municipal corporation, is the legal successor to the city governments of Guthrie, East Guthrie, West Guthrie, and Capitol Hill, said last named cities having been consolidated into the present city of Guthrie; that prior to such consolidation they were managed by separate city governments.

Third. That prior to December 25th, 1890, while the said separate city governments of Guthrie, East Guthrie, West Guthrie, and Capitol Hill were existing as separate city governments, they were consolidated for school purposes into one school district, which was denominated "Consolidated School District of Guthrie, East Guthrie, West Guthrie, and Capitol Hill."

Fourth. That for the purpose of carrying on the said city governments of Guthrie, East Guthrie, West Guthrie, and Capitol Hill, and the Consolidated School District, of said several cities, various debts were created by said cities and school district, which said cities and school district obligated themselves to pay.

Fifth. That, to wit: On December 25th, 1890, the legislature of the Territory of Oklahoma passed an act entitled "An act for the purpose of providing for the allowance and payment of the indebted-

ness heretofore created by the people and cities of Guthrie, East Guthrie, West Guthrie, and Capitol Hill, now consolidated into the village of Guthrie," wherein it was provided among other things, that the District Judge of Logan County, should appoint three (3) persons to act as a Commission to inquire into and pass upon all claims and demands theretofore issued by the city governments mentioned in the caption of the said act; that the owners and holders of script, warrants, or other evidence of indebtedness theretofore issued by said city governments, should present their claims to the commissioners and if the said commissioners should find that said claims were of the character mentioned
74 in said act, the same should be allowed and thereafter certified to the District Court for approval or disapproval, and that all claims allowed and approved by the district judge, should be certified to the mayor and council of the village of Guthrie, now the city of Guthrie, who were directed to issue warrants upon the village and people of the village, to the holders and owners thereof in installments, to be paid in one (1) two (2) three (3) four (4) and five (5) years and to bear interest at the rate of six per cent. (6%) per annum from the date of the allowance of the commission. And it was further provided in said act that said mayor and city council should levy a tax upon the property of the residents of said villages to pay all warrants so allowed and approved and that each of said cities should be liable for and taxable for the amount of indebtedness created by them, including the school boards of said cities.

Sixth. That on June 3rd, 1891, said commissioners duly allowed and certified certain claims in favor of Harper S. Cunningham, as receiver of the National Bank of Guthrie, in various and sundry sums, which claims were duly certified by said commissioners to the Judge of the district court of Logan County, as by law provided, and by said Judge duly approved, allowed and certified to the Mayor and Council of the then styled village of Guthrie, with instructions to issue warrants therefor and, on the 1st day of July, 1893, said mayor and city council in part payment of said claims so allowed as aforesaid, issued the warrant of the city of Guthrie, No. 1, dated July 1st, 1893, in the sum of Two Hundred Seventy-three and 77/100 Dollars, ($273.77) with interest thereon at the rate of six per cent. (6%) per annum from June 3rd, 1891, a true copy of said warrant is thereto attached, made a part thereof, and marked No. 1.

75 Seventh. Said relators further state that for a valuable consideration, after said warrant was issued as above set forth, they purchased the same and are now the owners and holders of said warrant.

Eighth. That by reason of the facts therein set out, it became and was the duty of the mayor and city council to levy a tax each year, for the payment of said warrant, and interest thereon, as by law provided, as the same became due and payable, in all of which particulars the said mayor and city council have wholly failed.

Ninth. That the relators therein have made demands at various

times for the levy of the tax for the purpose of paying said warrant indebtedness and on, to wit: July 16th, 1903, at a meeting of the mayor and city council in the city of Guthrie, at a time when said mayor and council had under consideration the levying of taxes to pay the indebtedness of the City of Guthrie, and on the various former sub-divisions thereof, which meeting was being held as an adjourned meeting for the purpose of making the annual levy of taxes, said relators again demanded a levy of taxes for the purpose of meeting the warrant indebtedness therein set forth, and, notwithstanding their duty in the premises, said mayor and council refused to make such levy.

Tenth. That there is now due upon said warrant the sum named therein together with interest at the rate of six per cent. (6%) per annum from June 3rd, 1891.

Eleventh. And said relators further stated that at no time since the issuance of said warrant has the mayor and council of the city of Guthrie, acting for and on behalf of the former sub-division thereof, levied a tax for the purpose of meeting said warrant indebtedness and of meeting the demand created by the obligation as under
76–122 the law they were bound to do. That said warrant indebtedness is an indebtedness which should be met by levy of taxes against that sub-division of the city of Guthrie known as Guthrie. And said relators aver that they have no other adequate remedy at law.

* * * * * * *

123 That thereafter, to wit: on the 7th day of August, 1903, the said defendants, C. M. Barnes, Mayor of the City of Guthrie, George Green, W. A. Packer, W. S. Spencer, E. E. Tallman, E. L. Hirschi, J. E. Peterson, J. W. McBrine, J. E. Douglas, J. N. Perkins and A. P. Portwood, Councilmen of the City of Guthrie, Logan County, Oklahoma Territory, filed in said court in said action their return and answer to said alternative Writ of Mandamus which said return and answer is in words and figures as follows:

In the District Court of Logan County, Oklahoma Territory.

C. W. Turner and James Kirkwood, Plaintiffs,

vs.

C. M. Barnes, Mayor of the City of Guthrie; George M. Green, W. A. Packer, W. S. Spencer, E. E. Tallman, E. L. Hirschi, J. E. Peterson, J. W. McBrine, J. E. Douglas, G. N. Perkins, and A. P. Portwood, Councilmen of the City of Guthrie, Logan County, Defendants.

1. Now come said Mayor and Councilmen, defendants, and for their joint and several return and answer to the alternative writ of mandamus heretofore issued in the above entitled action, say, that plaintiffs ought not to have a peremptory writ of mandamus against these defendants, or either of them, for the following reasons, to wit:

That said defendants deny each and all the material allegations

of said alternative writ, except such as are hereinafter specifically admitted.

124 Defendants admit that said defendant C. M. Barnes is the Mayor, and the other said defendants are the Councilmen of the said City of Guthrie.

And defendants further admit that W. H. Gray as Receiver of the National Bank of Guthrie and as the holder, as such Receiver, of the several warrants described in said alternative writ during the summer of 1895, made demand upon the then Mayor and Councilmen of said city of Guthrie to levy a tax for the payment of said warrants, and that said plaintiffs have made demands at various times since then on the Mayor and Council of said city to levy a tax to pay said warrants.

2. And for further return and answer to said alternative writ defendants say that plaintiffs ought not to have a peremptory writ against them or either of them for the further reasons, to wit:

That at the date of the issue of the warrants described in said alternative writ, to wit: July 1, 1893, the total amount of the indebtedness of said City of Guthrie, exclusive of said warrants, was in excess of four per centum of the value of the taxable property within said city as ascertained by the last assessment thereof for territorial and county taxes previous to their issue, and at that time, to wit: July 1, 1893, the assessed value of the taxable property within said city for the purpose of taxation for territorial, county and city taxes was $1,767,719.00, and the aggregate amount of indebtedness of said city of Guthrie, exclusive of said warrants, was then $71,000.

That the act of Congress of June 30, 1886, being Sec. 4 ch. 818, Vol. 24 U. S. Statutes at Large, page 177 provides:

125 "SECTION 4. That no political or municipal corporation, county, or other sub-division in any of the territories of the United States, shall ever become indebted in any manner, or for any purpose, to an amount in the aggregate, including existing indebtedness, exceeding four per centum of the value of the taxable property within such corporation, county, or sub-division, to be ascertained by the last assessment for territorial and county taxes, previous to the incurring of such indebtedness; and all bonds or obligations in excess of such amount given by such corporation, shall be void."

And defendants aver that said warrants sued on and described in said alternative writ being obligations in excess of four per centum on the value of the taxable property within said City of Guthrie as ascertained by the last assessment for territorial and county taxes previous to their issue, were, when issued, and still are illegal and void.

3. And for further return and answer to said alternative writ, defendants say that plaintiffs ought not to have a peremptory writ against them or either of them for the further reasons, to wit:

That during the year 1895 W. H. Gray was the duly and legally appointed receiver of the National Bank of Guthrie and the successor of Harper S. Cunningham to whom the warrants sued on and described in the alternative writ issued herein, were made payable, and as such receiver said W. H. Gray was then the holder of said war-

rants, and said W. H. Gray during the summer of 1895 made demand upon the then mayor and council of the city of Guthrie in said Logan County to levy a tax for the payment of said warrants pursuant to the provisions of Article 1 of Chapter 14 of the Statutes of Oklahoma of 1890.

126 And defendants aver and claim that if said W. H. Gray as such receiver or said plaintiffs in this action C. W. Turner and James A. Kirkwood as the subsequent holders of said warrants ever had a cause of action for mandamus against the Mayor and Council of said City of Guthrie to compel them to levy a tax to pay said warrants pursuant to the provisions of Article 1 of Chapter 14 of the Statutes of Oklahoma of 1890, such cause of action accrued during the year 1895 and was a cause of action upon a liability created by statute other than a forfeiture or penalty, and plaintiffs were required to bring such action within three years after such cause of action accrued, and defendants aver and claim that this action was not brought within three years after such cause of action accrued, and that plaintiffs are barred from maintaining this action of mandamus against defendants by the provisions of the second sub-division of section 18 of Article 3 of Chapter 66 in Vol. 2 page 973 of Wilson's Revised Statutes of Oklahoma.

4. And for a further return and answer to the alternative writ issued herein, defendants say that plaintiffs ought not to have a peremptory writ against them or either of them for the further reasons, to wit:

That during the year 1895 W. H. Gray was the duly and legally appointed receiver of the National Bank of Guthrie, and the successor of Harper S. Cunningham to whom the warrants sued on and described in said alternative writ, were made payable, and said W. H. Gray as such receiver was then the holder of said warrants, and said Gray during the summer of 1895 made demand upon Robert Martin the then Mayor and A. A. Humphrey, C. F. Cotteral, H. D. Todd, O. P. Cooper, A. O. Farquharson, E. Cook, A. G. Mecham, G. W. Hopkins and J. W. Capers the then Coun-

127 cilmen of said City of Guthrie, to levy a tax to pay said warrants pursuant to the provisions of Article 1 of Chapter 14 of the Statutes of Oklahoma of 1890, and afterwards, to wit: On the 7th day of September, 1895, said W. H. Gray as such receiver filed his verified petition in the District Court of said Logan County for a writ of mandamus against the said Mayor and Council of said city of Guthrie to compel them to levy a tax to pay said warrants pursuant to the provisions of Article 1 of Chapter 14 of the Statutes of Oklahoma of 1890 and afterwards, to wit: On the 9th day of September, 1895, an alternative writ of mandamus was issued upon said petition by the Hon. Frank Dale, the then Judge of said court, against said then Mayor and Council of said City of Guthrie, as praved for in said petition, and the same was served on said Mayor and Council on the 9th day of September, 1895, and on the 5th day of October, 1895, said Mayor and Council filed their return to said alternative writ, and afterwards on the trial of said cause in said court in October, 1895, a peremptory writ of mandamus was al-

lowed against said Mayor and Council as prayed for in said petition of said W. H. Gray.

And afterwards on the 26th day of October, 1895, said Mayor and Council filed their motion for a new trial of said cause which was by the court overruled, and excepted to, and said defendants given thirty days in which to make and serve a case for the Supreme Court of this Territory.

And afterwards and within the time allowed by the court said defendants in said action prepared, and served and had signed and settled by the Judge of said court such case made, which case made was filed in the office of the Clerk of the District Court of said Logan County, on the 29th day of November, 1895, and the same was afterwards on the 3rd day of December, 1895,
128 filed in the office of the clerk of the Supreme Court of this Territory a copy of which case made with all the endorsements thereon is hereto attached and marked "Exhibit A" and made a part hereof.

And afterwards, towit: On the 12th day of February, 1897, said cause came on for final trial and determination in said Supreme Court, and by the consideration of said Supreme Court, the judgment of the court below was reversed and remanded, a copy of the order of reversal and remandal of said cause as aforesaid is hereto attached and marked "Exhibit B" and made a part hereof, and which order of reversal was filed in the office of the Clerk of the District Court of said Logan County on the 7th day of April, 1897.

And defendants further aver that on the 28th day of June, 1901, the plaintiffs C. W. Turner and James Kirkwood filed their motion in said District Court to have said case redocketed, a copy of which motion is hereto annexed and marked "Exhibit C" and made a part hereof, and on the same day, to wit, on the 28th day of June, 1901, said C. W. Turner and James A. Kirkwood filed their motion in said court to revive said cause of action, a copy of which motion is hereto annexed and marked "Exhibit D" and made a part hereof, which motions were by said court allowed, and on the same day, towit, on the 28th day of June, 1901, said C. W. Turner and James A. Kirkwood filed their motion in said court in said action to dismiss said suit, without prejudice to a new cause of action, which motion was by the court sustained, and said suit was then dismissed by order of said court, a copy of which motion is hereto annexed and marked "Exhibit E" and made a part hereof.

And defendants aver that the present new action for mandamus against the Mayor and Council of said City of Guthrie was not commenced within one year after the reversal and dismissal
129 of said former action for mandamus as aforesaid, and that plaintiffs are barred by the provisions of section 23 of Article 3 of Chapter 66 of the Statutes of Oklahoma from maintaining this action for mandamus against said defendants and defendants rely upon said section 23, as a bar to this action.

Wherefore, defendants pray that a peremptory writ of mandamus

against defendants be denied, and that said action be dismissed at the costs of said plaintiffs.

JAMES HEPBURN,
LAWRENCE & HUSTON,
Attorneys for Defendants.

130 EXHIBIT A.

In the Supreme Court of the Territory of Oklahoma.

No. 385.

ROBERT MARTIN, Mayor, and A. A. HUMPHREY, C. F. COTTERAL, H. D. TODD, JOHN FAIRFIELD, O. P. COOPER, A. O. FARQUHARSON, E. COOK, A. G. MECHAM, G. W. HOPKINS, and JAMES W. CAPERS, as Councilmen of the City of Guthrie, O. T., Plaintiffs in Error,

vs.

TERRITORY OF OKLAHOMA *ex Rel.* W. H. GRAY, Receiver of the National Bank of Guthrie, Defendants in Error.

Petition in Error.

The plaintiffs in error complain of the defendant in error that on the 26th day of October, 1895, the defendant in error herein and relator in the court below recovered a judgment against the plaintiffs in error herein, respondents in the court below in the District Court of Logan County, Oklahoma, as prayed for in the petition of the relator in an action pending in said court in a proceeding of mandamus wherein the plaintiffs in error herein were respondents and the defendants herein were relators. A transcript of the proceedings containing said final judgment and case made hereto attached and made a part hereof. The plaintiffs in error, allege in this court that there is error in this proceeding and judgment in this:

1. That the alternative writ of mandamus does not state facts sufficient to constitute any cause of action in favor of the relator and against the respondents.
2. That the court below erred in not sustaining the respondents' motion to quash the alternative writ of mandamus.

131 3. That the court erred in sustaining the motion of the relator for a judgment upon the alternative writ of mandamus and return thereto by the respondents.

4. The court erred in entering a judgment upon the alternative writ of mandamus and the return thereto by the respondents unsupported by any evidence.
5. The court erred in not rendering a judgment in favor of the respondents.
6. The decision of the court is contrary to the law.
7. The court erred in overruling the motion for a new trial.

The plaintiffs in error therefore pray that said judgment may be reversed and that the District Court be directed to enter a judgment in favor of the respondents in the court below and for such other relief as justice may require.

B. T. HAINER,
Attorney for the Plaintiffs in Error.

We hereby accept service of the above and foregoing petition in error by the receipt of a copy thereof on this 19th day of December, 1895, and hereby waive the issuance of a summons in error and enter our appearance in the Supreme Court for the defendant in error.

JOHN F. STONE &
S. L. OVERSTREET,
Attorneys for Defendant in Error.

132 Filed Nov. 29, 1895. Louis E. Pitts, Clerk Dist. Court.

United States District Court, First Judicial District of Oklahoma Territory Within and for Logan County, September Term, A. D. 1895.

No. 2032.

TERRITORY OF OKLAHOMA *ex Rel.* W. H. GRAY, Receiver of the National Bank of Guthrie, Relator,

vs.

ROBERT MARTIN, Mayor, and A. A. HUMPHREY, C. F. COTTERAL, H. D. TODD, JOHN FAIRFIELD, O. P. COOPER, A. O. FARQUHARSON, E. COOK, A. G. MECHAM, G. W. HOPKINS, and J. W. CAPERS, Councilmen of the City of Guthrie, O. T., Respondents.

Case Made.

Be it remembered that heretofore, to wit, on the 17th day of September, A. D. 1895, the relator, W. H. Gray, Receiver of the National Bank of Guthrie, filed his petition duly verified for a writ of mandamus against the above named respondents, Robert Martin, Mayor and A. A. Humphrey, C. F. Cotteral, H. D. Todd, John Fairfield, O. P. Cooper, A. O. Farquharson, E. Cook, A. C. Mecham, G. W. Hopkins and J. W. Capers, as Councilmen of the City of Guthrie, O. T., which petition is in the words and figures following, viz:

TERRITORY OF OKLAHOMA, *Logan County, ss:*

Personally appeared W. H. Gray who being first duly sworn on his oath says that he is the duly appointed, qualified and acting receiver of the National Bank of Guthrie, acting by virtue of an appointment by the District Court of the First Judicial District of Oklahoma Territory sitting in and for Logan County.

That Robert Martin is the duly elected, qualified and acting Mayor of the City of Guthrie, and C. F. Cotteral, H. D. Todd, John Fairfield, O. P. Cooper, A. O. Farquharson, E. Cook, J. W. Capers, A. A. Humphrey, G. W. Hopkins and A. G. Mecham are the duly elected, qualified and acting Councilmen of the City of Guthrie.

133 That affiant now has in his possession as such receiver and as a part of the assets of said National Bank of Guthrie certain warrants issued by the City of Guthrie in settlement and compromise of certain causes pending in the District Court of Logan County in Oklahoma Territory against the provisional governments of Guthrie, East Guthrie and Capitol Hill, and the consolidated school district composed of the territory included in the provisional cities of Guthrie, East Guthrie, West Guthrie and Capitol Hill, such compromise and settlements being made as evidenced by the judgments of said court recorded on pages 245 and 286 of judgment record number one in the office of the clerk of said court.

That certain of said warrants are now due and unpaid and certain other of said warrants will become due on July 1, 1896, a list of which warrants so due and unpaid and to become due on July 1st, 1896, is hereto attached and made a part hereof marked Exhibit "A."

That under the laws of the Territory of Oklahoma it is made the duty of the Mayor and Council of the City of Guthrie to levy a tax, to be levied and collected for the payment of such warrants, and to cause the same to be certified to the county clerk of Logan County, to be placed on the tax rolls for the collection of other taxes.

That this affiant has frequently requested the said Mayor and Council to make a levy for the payment of such warrants, which the said Mayor and Council unmindful of and in disregard of their official duty have failed and refused and still fail and refuse to do.

Wherefore affiant asks that a writ of mandamus issue commanding the said Robert Martin, Mayor aforesaid and the said

134 C. F. Cotteral H. D. Todd, John Fairfield, O. P. Cooper, A. O. Farquharson, E. Cook, J. W. Capers, A. A. Humphrey, G. W. Hopkins and A. G. Mecham, Councilmen as aforesaid to proceed forthwith to levy a tax for the payment of the aforesaid warrants, and to cause the said tax levy to be certified to the County Clerk of Logan County to be placed on the tax rolls for collection and for such other and further relief as may to the court seem proper.

H. W. GRAY,
Receiver National Bank of Guthrie.

Subscribed and sworn to before me this 31 day of August, 1895.

LOUIS E. PITTS,
[SEAL.] *Clerk District Court.*

Endorsed on back: # 2032—Affidavit for writ of mandamus—Filed Sept. 7, 1895, Louis E. Pitts, Clerk District Court, By Alfred S. De Witt, Deputy.

135 "EXHIBIT A."

Warrant of the City of Guthrie, Oklahoma Territory.

$273.77. No. 1.

Treasurer of the City of Guthrie:

One year after date pay to the order of Harper S. Cunningham, Receiver of National Bank Guthrie, the sum of Two Hundred and Seventy-three and 77/100 Dollars, with interest thereon at the rate of six per centum per annum, from June 3rd, 1891, from any moneys which shall arise from special levy for the payment of City warrants issued under the provisions of Chapter No. 14, of the statutes of Oklahoma, providing for the payment of indebtedness of the provisional governments of the Cities of Guthrie, East Guthrie, West Guthrie and Capitol Hill, upon the sub-division of Guthrie known as Guthrie.

By order of the City Council, July 1, 1893.

A. M. McELHINNEY, *Mayor.*

Attest:

E. G. MILLIKAN,
[SEAL.] *City Clerk.*

The remainder of said warrants are uniformly the same as the above and foregoing, the only difference being the sub-divisions of the City of Guthrie, against which they are issued and the amounts and numbers and date of payments.

136 And afterwards, and on the 9th day of September, A. D., 1895, — filed his notice of application for writ of mandamus against said respondent, on which said notice was also written and acceptance of service of said notice, which said notice together with the endorsements thereon are in the words and figures as follows, to wit:

To Robert Martin, Mayor, and A. A. Humphrey, C. F. Cotteral, H. D. Todd, John Fairfield, O. P. Cooper, A. O. Farquharson, A. G. Mecham, E. Cook, G. W. Hopkins, and J. W. Capers, Councilmen of the City of Guthrie:

You are hereby notified that on the 7th day of September, 1895, I will apply to the Judge of the District Court of Logan County, Oklahoma Territory, for a writ of mandamus to issue against you requiring you to levy a tax to pay certain warrants now in my possession as Receiver of the National Bank of Guthrie.

W. H. GRAY,
Receiver of the National Bank of Guthrie,
Per JOHN F. STONE, *Att'y.*

Service accepted this 3rd day of September, 1895.

B. T. HAINER,
City Attorney.

Endorsed on back: 2032—W. H. Gray, Receiver, *vs.* Robert Martin, *et al.*—Notice—Filed September 9, 1895, Louis E. Pitts, Clerk District Court.

137 And thereafter, and on the same day, the Honorable Frank Dale, Judge of the above entitled court, after due consideration, allowed said application and issued an alternative writ of mandamus against the said respondents, which writ and the endorsements thereon are in the words and figures following, to wit:

TERRITORY OF OKLAHOMA, *Logan County, ss:*

In the District Court.

THE TERRITORY OF OKLAHOMA *ex Rel.* W. H. GRAY, Receiver of the National Bank of Guthrie, Petitioner,

vs.

ROBERT MARTIN, Mayor, and A. A. HUMPHREY ET AL., Councilmen of the City of Guthrie, Respondents.

Alternative Writ of Mandamus.

To Robert Martin, Mayor, and A. A. Humphrey, C. F. Cotteral, H. D. Todd, John Fairfield, O. P. Cooper, A. O. Farquharson, E. Cook, A. G. Mecham, G. W. Hopkins, and J. W. Capers, Councilmen of the City of Guthrie, Oklahoma Territory:

Whereas it has been shown to the undersigned Judge of the District Court of the First Judicial District of Oklahoma Territory upon the relation of W. H. Gray:—

That the said W. H. Gray is the duly appointed, qualified and acting receiver of the National Bank of Guthrie, acting under and by virtue of an appointment from the District Court of the First Judicial District in and for Logan County, Oklahoma Territory.

138 That Robert Martin is the duly elected, qualified and acting Mayor, and A. A. Humphrey, C. F. Cotteral, H. D. Todd, John Fairfield, O. P. Cooper, A. O. Farquharson, E. Cook, A. G. Mecham, G. W. Hopkins and J. W. Capers are the duly elected, qualified and acting Councilmen of the City of Guthrie.

That as such Receiver the said W. H. Gray has in his possession certain warrants as a part of the assets of the said National Bank of Guthrie, issued by the City of Guthrie in settlement and compromise of certain causes pending in the District Court of Logan County in Oklahoma Territory against the provisional government of East Guthrie, Guthrie, and Capitol Hill, and the consolidated school district composed of Guthrie, East Guthrie, West Guthrie, and Capitol Hill, such compromise and settlement being made as evidenced by the judgments of said court recorded on pages 245 and 286 of Judgment Record Number one in the office of the Clerk of said Court.

That certain of said warrants are now due and unpaid and that certain other of said warrants will become due on July 1st, 1896, which said warrants are described as follows, to wit:

Warrants numbered one, two and three against that part of the City of Guthrie known as Guthire, each for the sum of two hundred and seventy-three and 77/100 dollars, dated July 1, 1893, with interest at six per cent. from June 3, 1891.

Warrants numbered one and two being past due and number three to become due on July 1, 1896.

Warrants numbered six, seven and eight against that part of the City of Guthrie known as East Guthrie each being for the sum of five hundred fifty-four and 15/100 dollars dated July 1, 1893, with interest at six per cent. from June 3, 1891. Warrants six and seven being past due and warrant number eight to become due on July 1, 1896.

139 Warrants numbered eleven, twelve, thirteen and sixteen against that part of the City of Guthrie known as Capitol Hill, warrants numbered eleven, twelve and sixteen being past due and warrant number thirteen to become due on July 1, 1896. Warrants number- eleven, twelve and thirteen being for the sum of two hundred dollars each, and warrant number sixteen being for the sum of seven and 60/100 dollars. All dated July 1, 1893, and bearing interest from June 3, 1891, at six per cent. Warrants numbered twenty-one, twenty-two and twenty-three against the consolidated school district composed of Guthrie, East Guthrie, West Guthrie and Capitol Hill each for the sum of thirty-four and 80/100 dollars. Dated July 1, 1893, with interest at six per cent. from June 3, 1891. Warrants numbered twenty-one and twenty-two being past due and warrants number thenty-three to become due on July 1, 1896.

All of said warrants being issued by the City of Guthrie pursuant to the provisions of Article 1 of Chapter XIV of the Statutes of Oklahoma, 1890, entitled "An act for the purpose of providing for the allowance and payment of the indebtedness, heretofore created by the people and cities of Guthrie, East Guthrie, West Guthrie and Capitol Hill now consolidated into the Village of Guthrie."

That under the laws of the Territory of Oklahoma it is made the duty of the Mayor and Council of the City of Guthrie to levy taxes upon the taxable property of the parts of the said city of Guthrie against which said warrants were issued, to be levied and collected for the payment of such warrants, and to cause the same to be certified to the County Clerk of said Logan County to be placed on the tax rolls for collection as other taxes.

That you have — frequently requested to make such levies
140 as by law provided, but that unmindful of and in disregard of your official duty you have failed and refused and still fail and refuse so to do.

And whereas, these allegations have been verified by the affidavit of said W. H. Gray which verified petition has been duly filed with the Clerk of said District Court.

Now, therefore, these are to command you that you the said

Robert Martin, Mayor, and you the said A. A. Humphrey, C. F. Cotteral, H. D. Todd, John Fairfield, O. P. Cooper, A. O. Farquaharson, A. G. Mecham, E. Cook, G. W. Hopkins and J. W. Capers, Councilmen of the City of Guthrie aforesaid immediately upon the receipt of this writ to levy upon the taxable property of the City of Guthrie by law made chargeable therewith a tax sufficient to pay all of such warrants now due or to become due on or before July 1, 1896, together with interest thereon and to cause the said levy to be certified to the County Clerk of Logan County to be spread upon the tax rolls for collection; or that you show cause before the district court aforesaid at 10 o'clock A. M. on the 16th day of September, 1895, or as soon thereafter as counsel can be heard why you have not done so and have you then and there this writ, with your return thereof having done as you are commanded.

FRANK DALE, *Judge.*

Endorsed on back: 2032—W. H. Gray, Receiver, *vs.* Robert Martin, Mayor, *et al.*—Alternative Writ of Mandamus—Writ allowed—Frank Dale, Judge—Filed Sept. 9, 1895, Louis E. Pitts, Clerk District Court.

141 And thereafter and on the 16th day of September A. D. 1895, the respondent herein filed his motion to set aside and quash the alternative writ of mandamus, heretofore in this cause issued against him, which said motion is in the words and figures following, to wit:

In the District Court in and for Logan County, Territory of Oklahoma.

No. 2032.

THE TERRITORY OF OKLAHOMA *ex Rel.* W. H. GRAY, Receiver of the National Bank of Guthrie, Petitioner,

vs.

ROBERT MARTIN, Mayor, and A. A. HUMPHREY ET AL., Councilmen of the City of Guthrie, Respondents.

Motion to Set Aside and Quash Alternative Writ of Mandamus.

Now comes the above named respondents by their attorney Bayard T. Hainer, and moves the court to set aside and quash the alternative writ of mandamus heretofore issued for the following causes:

1. That there is defect of parties defendant.
2. That several causes of action are improperly joined.
3. That it does not state facts sufficient to entitled the petitioner or relator to the relief sought.

BAYARD T. HAINER,
Attorney for Respondents.

Endorsed on back: No. 2032—*Ex rel.* W. H. Gray, Receiver, *vs.* Robert Martin *et al.*—Motion to quash Alt. Writ by Respondents. Filed Sept. 16, Louie E. Pitts, Clerk District Court—Bayard T. Hainer, Attorney for Respondents.

142 And thereafter, on the 27th day of September, A. D. 1895, the said motion to set aside and quash alternative writ of mandamus heretofore issued against the above named respondents, coming on to be heard was by the court considered and overruled, to which ruling the respondents at the time duly excepted; and on the same day the court having overruled said motion ruled the respondents herein to file their return to said alternative writ of mandamus within six days, and

Therefore, and on the 5th day of October A. D. 1895, the said respondent- filed *his* return to the alternative writ of mandamus, heretofore issued against them in this cause, which return together with the endorsements thereon is in the words and figures as follows, viz:

In the District Court of Logan County, Oklahoma Territory.

THE TERRITORY OF OKLAHOMA *ex Rel.* W. H. GRAY, Receiver of the National Bank of Guthrie, Petitioner,

vs.

ROBERT MARTIN, Mayor, and A. A. HUMPHREY ET AL., Councilmen of the City of Guthrie, Respondents.

Return to the Alternative Writ of Mandamus.

Now comes the above named respondents by their attorney B. T. Hainer, and for their return to the alternative writ of mandamus heretofore issued allege:

First. Respondents admit that they are the duly elected, qualified and acting mayor and councilmen of the City of Guthrie.

Second. That they admit that W. H. Gray is the duly appointed qualified and acting receiver of the National Bank of Guthrie.

143 Third. They admit that W. H. Gray as receiver of the National Bank of Guthrie, has in his possession and custody certain warrants issued in payment of a certain indebtedness contracted by the provisional governments of what was formerly known at Guthrie, East Guthrie, Capitol Hill and the consolidated school district composed of Guthrie, East Guthrie and Capitol Hill, said warrants were numbered from one to twenty-five inclusive, and were issued on July 6, 1893, and aggregate in amount over five thousand dollars ($5,000.00) exclusive of interest.

Fourth. The respondents allege that said pretended warrants were issued in pursuance to chapter number fourteen of the Statutes of Oklahoma for 1890, providing for the payment of certain indebtedness contracted by the provisional governments of the cities of Guthrie, East Guthrie and Capitol Hill.

Fifth. That said warrants are illegal and void and were void at the date of issue for conflict with the provisions of section four, chapter eight hundred and eighteen of the act of Congress (24 Stat. 17) which prohibits municipal corporations in Territories from becoming indebted in excess of four per centum of the assessed valuation of property for territorial and county taxes.

Sixth. Respondents aver that chapter fourteen of the statutes of Oklahoma for 1890 is illegal and void for conflict with section one of chapter 818 (24 Stat. 17) of the act of Congress which prohibits any territory in the United States from passing special laws for the assessment and collection of taxes in any territory, county, township or road district.

Seventh. Respondents aver that the mayor and council *has* no power or authority to compromise or settle, in any shape, form or manner, any indebtedness contracted by the provisional governments of Guthrie, East Guthrie, West Guthrie *or* Capitol Hill, and any such compromise or settlement was and is null and void.

144 Eighth. That respondents further aver that any warrants issued by the mayor and city council in payment of any of said provisional indebtedness was without any authority of law beyond their scope of power, in conflict with the laws of the United States and therefore illegal and void.

Ninth. Respondents aver that at the time said warrants were issued, to wit, July 6, 1893, the assessed value of the taxable property within said city for the purposes of taxation for territorial, county and city purposes, was $1,767,719.00.

Tenth. That the aggregate amount of the indebtedness of the city of Guthrie, exclusive of the warrants issued to the receiver of the National Bank of Guthrie and now in the custody of the petitioner herein, was seventy-one thousand dollars.

Eleventh. That at the date that said warrants were issued to the receiver of the National Bank and now in possession of said receiver the total amount of the indebtedness of the City of Guthrie was in excess of four per centum of the value of the taxable property within said city ascertained by the last assessment thereof for territorial and county taxes and previous to their issue.

Twelfth. Respondents further aver that said warrants were issued contrary to the acts of Congress and the laws of the Territory of Oklahoma, and that they have no power or authority to levy said tax.

Wherefore, the respondents pray that the said W. H. Gray, receiver of the National Bank be required to surrender said warrants to this court, that said warrants so illegally issued be declared null and void by the court and that they be ordered to be cancelled and for such other relief as is just and equitable in the premises.

B. T. HAINER,
Attorney for Respondents.

145 TERRITORY OF OKLAHOMA, *Logan County, ss:*

B. T. Hainer being first duly sworn says that he has read the above and foregoing return to the Alternative Writ of Mandamus and that the facts therein set forth are true as he verily believes.

B. T. HAINER.

Subscribed and sworn to before me this 5th day of October, 1895.
—— ——.

Endorsed on back: # 2032—*Ex rel.* W. H. Gray, Receiver, *vs.* Robert Martin *et al.*—Return to the Alt. Writ by Respondents.—Filed Oct. 5, 1895, Louis E. Pitts, Clerk District Court.—B. T. Hainer, Att'y for Respondents.

And there was not any other pleading filed in said action, and said action was tried on the aforesaid pleadings and the issues made as above shown. And be it further remembered that afterwards, and at the September term, A. D. 1895, of the said District Court in the aforesaid County of Logan, said cause came on for trial and was tried in that court, to the court without the intervention of a jury, in which action during that September term, A. D. 1895, of said District Court of the County of Logan, such evidence was given, rulings and decisions made, objections made, exceptions taken, proceedings had, evidence offered and judgments rendered as are hereafter shown by the stenographer's transcript of the same, taken in open court upon the hearing of said cause, which transcript is in words and figures as follows; to wit:

146 In the District Court of Logan County, Oklahoma Territory.

No. 2032.

W. H. GRAY, Receiver, Plaintiff,
vs.
ROBERT MARTIN, Mayor, ET AL., Defendants.

GUTHRIE, OKLAHOMA, *October* —, 1895.

Before His Honor Frank Dale, Without a Jury.

Appearances.

For Plaintiff, S. L. Overstreet & John F. Stone.
For Defendant, B. T. Hainer, City Attorney.

Stenographer's Transcript of Oral Proceedings.

147 *Statement by Mr. Overstreet.*

The same question is involved in both these cases (referring to numbers 2031 and 2032) and it is agreeable to Mr. Hainer, Counsel for the City that the evidence introduced in one will be taken as the evidence in the other case.

I think, your Honor, that we are entitled to a judgment upon the return to the writ, and upon the facts as set forth in the return.

By the COURT (After argument of counsel):

The motion for judgment upon the return is granted and judgment entered in accordance with the prayer of the petition of the relator. To which ruling of the court the respondent excepted at the time, which exception was by the court allowed.

And thereupon the respondent filed its motion for a new trial which is in the words and figures as follows, to wit:

In the District Court of Logan County, Oklahoma Territory.

THE TERRITORY OF OKLAHOMA *ex Rel.* W. H. GRAY, Receiver of the National Bank of Guthrie, Petitioner,

vs.

ROBERT MARTIN, Mayor, and A. A. HUMPHREY ET AL., Council of the City of Guthrie, Respondents.

Motion for a New Trial.

Now comes the above named respondents by their attorney B. T. Hainer, and moves the court to grant the respondents a new trial in said cause for the following reasons affecting materially the substantial rights of the respondents:

148 First. Because the court erred in not sustaining the motion to quash the Alternative Writ of the petitioner or relator in the above entitled action.

Second. That the decision of the court is not sustained by any evidence.

Third. That the decision of the court is contrary to the law.

Fourth. The court erred in rendering judgment upon the petition of the relator and return to the Alternative Writ by the respondents over the objections of the respondents.

Fifth. The court erred in not permitting the respondents to introduce evidence in support of the return to the Alternative Writ of Mandamus.

Sixth. The court erred in entering judgment in favor of the relator and against the respondents in said action.

Wherefore, the respondents pray that the decision of the court be vacated, set aside and held for naught and that a new trial be granted herein.

B. T. HAINER,
Attorney for Respondents.

Endorsed: 2032—W. H. Gray, Receiver, *vs.* Robert Martin *et al.*—Motion for New Trial—Filed Oct. 26, 1895, Louis E. Pitts, Clerk District Court.

149 And thereupon the court overrules said motion for a new trial, to which ruling of the court the respondent at the time excepted. Thereupon the court entered judgment as prayed for in the petition of the relator, to which judgment the respondent at the time excepted, and thereupon, upon application of respondent,

the court grants to respondent thirty days within which to make and serve a case made for the Supreme Court, with ten days to the relator to suggest amendments, and five days' notice in writing by either partiy of the time and place of settling and signing case made.

TERRITORY OF OKLAHOMA, *County of Logan, ss:*

I, Frank L. De Lay, official stenographer of said court, hereby certifies that the foregoing is a true and correct transcript of my shorthand notes taken in the trial of said cause of all the oral proceedings there had.

FRANK L. DE LAY.

150 And thereupon the clerk of said court prepared a journal entry of the proceedings in said cause, which said journal entry is in the words and figures as follows, to wit:

United States District Court, First Judicial District of Oklahoma Territory, Within and for Logan County, September Term, A. D., 1895, October 26, 1895.

2032.

W. H. GRAY, Receiver,
vs.
ROBERT MARTIN, Mayor ET AL.

Now at this time the above cause is called for hearing upon the relator's motion for judgment upon the respondents return to the Alternative Writ of Mandamus; the relator appears by his attorneys J. F. Stone and S. L. Overstreet, and the respondents by their attorney B. T. Hainer. The court having heard the motion and the arguments of counsel thereon and being well and fully advised sustains said motion and renders judgment thereon for said relator as prayed in relator's petition and as per journal entry of record.

The defendants duly except to said judgment and ruling of the court at the time the respondent files and presents his motion for new trial, which motion is by the court considered, and overruled to which ruling of the court the respondents except. Thirty days are now given in which to make and serve a case for the Supreme Court, ten days are given relator to suggest amendments to said case made, said case made to be signed and settled upon five days' notice in writing by either party.

151 And the above and foregoing contains and shows all the pleadings, evidence, objections and exceptions made and taken thereto, all findings of fact and of law, judgments of the court, exceptions and objections taken and made thereto, and there was not any other evidence heard, testimony given, objection made,

exception taken, paper or pleading introduced other than is above set forth and shown; and

Thereafter and within the time limited therefor the said respondent made and served this his case made on the above named relator, who accepted said case made for suggestions of amendment in the words and figures as follows, to wit:

Service of the foregoing case made for suggestion of amendment is hereby accepted this 20 day of November A. D. 1895.

JOHN F. STONE &
S. L. OVERSTREET,
Attorneys for Relator.

And thereafter, and on the 25 day of November, 1895, the said relator suggests amendments to said case made.

152 And be it further remembered that upon due notice of the time and place of settling this case made and by agreement of parties and upon the same being presented by respondents and relator to the undersigned Frank Dale, Judge of said Court, before whom said action was tried, to be settled, signed and attested, I do now settle, and sign the case made and cause it to be attested by the clerk of the said District Court of Logan County, and the seal thereof to be hereto affixed.

This case made to be a case made for said respondents and also for said relator.

Dated this 25th day of November, A. D. 1895.

FRANK DALE,
Judge of the District Court, Logan County, Oklahoma Territory.

Attested by me the clerk of the District Court in the above named County of Logan, Territory of Oklahoma. Witness my hand and the seal of said court hereto affixed this 25th day of November, A. D. 1895.

LOUIS E. PITTS,
[SEAL.] *Clerk, District Court.*
ALFRED S. DE WITT, *Dep.*

153 "EXHIBIT B."

UNITED STATES OF AMERICA, *Territory of Oklahoma, ss:*

Be it remembered, That on this the 12th day of February, A. D. 1897, the Supreme Court of the Territory of Oklahoma met in the City of Guthrie. The above date being one of the regular judicial days of the January term of said Court.

There were present, Hon. Frank Dale, Chief Justice, Hons. A. G. C. Bierer, John L. McAtee, John C. Tarsney, and James R. Keaton, Associate Justices; Hon. C. R. Brooks, U. S. Attorney, Hon. P. S. Nagle, U. S. Marshal, Edgar W. Jones, Clerk, and W. A. Taylor, Court Crier.

Public proclamation of the opening of court having been made by the crier, the following among other business was had and done:

No. 385.

ROBERT MARTIN, Mayor, City of Guthrie *ex Rel.*, Appellant,
vs.
WM. H. GRAY, Receiver, Appellee.

The above cause having come on for final determination and the court being fully advised in the premises,

It is therefore considered by the Court that the judgment of the Court below in the above entitled cause be in all things reversed and remanded at the cost of the above appellee, said costs amounting to the sum of — Dollars and — cents, all of which is ordered to be certified to said Court below.

154 UNITED STATES OF AMERICA, *Territory of Oklahoma:*

In the Supreme Court.

I Edgar W. Jones, Clerk of the Supreme Court of the Territory of Oklahoma, certify the above and foregoing to be a true and complete copy of the opinion and judgment of said court in the above entitled cause.

In witness whereof, I hereunto set my hand and affix the seal of said Court at my office in the City of Guthrie on this 7th day of April, A. D., 1897.

EDGAR W. JONES,
Clerk of the Supreme Court.

[SEAL.]

Endorsed: No. 2032—Filed April 7, 1897, Louis E. Pitts, Clerk Dist. Court.

155 EXHIBIT C.

In the District Court of Logan County, Oklahoma Territory.

No. 2032.

TERRITORY OF OKLAHOMA *ex Rel.* W. H. GRAY, Receiver,
vs.
ROBERT MARTIN, Mayor, & A. A. HUMPHREY ET AL.

Motion to Redocket Cause.

Come now the undersigned successors in interest to the plaintiff and move the Court to redocket the above entitled cause.

C. W. TURNER &
JAMES A. KIRKWOOD,
By DALE & BIERER,
Their Attorneys.

Endorsed: M. D.—No. 2032—The Territory of Oklahoma, *ex rel.* W. H. Gray, Rec. *vs.* Robert Martin, Mayor, *et al.*—Motion to Redocket cause—Filed June 28, 1901, M. C. Hart, Clerk Dist. Court.—Dale & Bierer, Attorneys.

156 EXHIBIT D.

In the District Court of Logan County, Oklahoma Territory.

Cause No. 2032.

THE TERRITORY OF OKLAHOMA *ex Rel.* W. H. GRAY, Receiver of the National Bank of Guthrie, Oklahoma, Petitioners,

vs.

ROBERT MARTIN, Mayor, and A. A. HUMPHREY ET AL., Councilmen of the City of Guthrie, Respondents.

Motion to Revive and Continue Cause by the Successors in Interest of Plaintiff.

Comes now C. W. Turner and James A. Kirkwood and show to the court that to wit, on September 9, 1895, the above styled cause was commenced in the District Court of Logan County, Oklahoma Territory by W. H. Gray, then Receiver of the National Bank of Guthrie, and was so instituted for the purpose of compelling the defendant above named to levy a tax to pay certain warrants theretofore issued by and outstanding against the City of Guthrie. The defendants above named being at that time the Mayor and City Council thereof. That to wit, on the — day of February, 1901, W. H. Gray, Receiver, above named was discharged as Receiver of the National Bank of Guthrie, and the affairs of said National Bank of Guthrie were finally settled at said date and no successor in interest or Receiver on behalf of the National Bank of Guthrie was appointed by the court. That, to wit, on or about the 5th day of January, 1901, the undersigned C. W. Turner and James A. Kirkwood purchased of W. H. Gray, Receiver, the warrants named and mentioned in the petition filed in the above entitled cause and since said date the estate of the National Bank of Guthrie
157 nor W. H. Gray, Receiver, has had any interest whatever in the subject-matter of the litigation of the above entitled cause. That the undersigned are the sole and only owners of the warrants mentioned in the petition in said cause and now desires to have the same revived and continued in the name of the undersigned.

Wherefore, the undersigned asks for a revivor of said cause and a continuation thereof under their names.

C. W. TURNER AND
JAMES A. KIRKWOOD,
By DALE & BIERER, *Attorneys.*

Endorsed: M. D.—No. 2032—The Territory of Oklahoma *ex rel.* W. H. Gray, Rec. *vs.* Robert Martin, Mayor, *et al.*—Motion for leave to carry on case in name of successors in interest.—Filed June 28, 1901, M. C. Hart, Clerk Dist. Court.—Dale & Bierer, Attorneys.

158 EXHIBIT E.

In the District Court of Logan County, Oklahoma Territory.

Cause No. 2032.

THE TERRITORY OF OKLAHOMA *ex Rel.* W. H. GRAY, Receiver of the National Bank of Guthrie, Plaintiffs,

vs.

ROBERT MARTIN, Mayor, and A. A. HUMPHREY ET AL., Councilmen of the City of Guthrie, Defendants.

Motion to Dismiss Cause of Action.

Comes now C. W. Turner and James A. Kirkwood, and to show the court that to wit, June 28th, 1901, and prior to the time of the filing of this motion the above styled cause was revived and continued in their names as successors in interest of the plaintiff above named, and said undersigned, as plaintiffs in said action, here now move a dismissal thereof without prejudice to a new or further action against the defendants above named or their successors in interest.

C. W. TURNER AND
JAMES A. KIRKWOOD,
By DALE & BIERER, *Attorneys.*

Endorsed: M. D. No. 2032—The Territory of Oklahoma *ex rel.* W. H. Gray, Rec. *vs.* Robert Martin *et al.*—Motion to dismiss—Filed June 28, 1901, M. C. Hart, Clerk District Court.—Dale & Bierer, Attorneys.

159 That thereafter, to wit: on the 15th day of December, 1903, the plaintiffs filed in said court in said cause their reply to the said return and answer of the said defendants which said reply is in words and figures as follows:

In the District Court in and for Logan County, Oklahoma Territory.

No. 4196.

C. W. TURNER ET AL., Plaintiffs,

vs.

C. M. BARNES, Mayor, ET AL., Defendants.

Reply.

Comes the plaintiffs in this action and for their reply to defendants' answer: 1st. Deny each and every material allegation set up by defendants in their answer, not by the plaintiffs plead.

DALE & BIERER,
Att'ys for Plaintiffs.

160 Be it remembered, that said cause was afterwards regularly set for trial and that the same came on for trial before the said court on the 23 day of December, 1903, and such proceedings were had and evidence offered and admitted in the trial of said cause as are shown and set forth in the transcript of evidence which said transcript is in words and figures as follows:

In the District Court of Logan County, Oklahoma.

C. W. TURNER and JAMES A. KIRKWOOD, Plaintiffs,
vs.
C. M. BARNES ET AL., Defendants.

Transcript.

Tried at the November, 1903, Term of the above entitled court, before Hon. John H. Burford, Judge, without a jury.

Appearances.

For the Plaintiffs, Dale & Bierer, J. D. De Bois.
For the Defendants, James Hepburn, City Attorney, Lawrence & Huston, of counsel.

Thereupon the plaintiffs introduced in evidence the deposition of JAMES A. KIRKWOOD, which is as follows:—

Q. What is your name?
A. James A. Kirkwood.
Q. What is your age?
A. I am forty-five.
Q. Where do you reside?
A. I reside at 414 Traphagen Street, West Hoboken, Hudson County, New Jersey.

161 Q. What is your business or occupation?
A. I am a commission merchant.
Q. Where is your place of business?
A. 359 Greenwich Street, New York City.
Q. Are you James A. Kirkwood who is one of the plaintiffs in an action now pending in the District Court of the Judicial District of Oklahoma, sitting in and for the County of Logan wherein C. W. Turner and James A. Kirkwood are plaintiffs and C. M. Barnes and others are defendants?
A. I am.
Q. I show you the following warrants of the City of Guthrie together with the endorsements thereon,

No.	1	Dated	July 1,	1893,	for	$273.77
"	2	"	"	"	"	273.77
"	3	"	"	"	"	273.77

No.	4	Dated	July 1, 1893,	for	$273.77
"	5	"	"	"	273.77
"	6	"	"	"	554.15
"	7	"	"	"	554.15
"	8	"	"	"	554.15
"	9	"	"	"	554.15
"	10	"	"	"	554.15
"	16	"	"	"	7.60
"	21	"	"	"	34.80
"	22	"	"	"	34.80
"	23	"	"	"	34.80
"	24	"	"	"	34.80
"	25	"	"	"	34.80

Q. Who are the holders and owners of the above mentioned and described warrants?

162 A. I, James A. Kirkwood, together with Mr. C. W. Turner, my co-plaintiff in this proceeding, am now the holder and owner of the warrants shown to me. I identify them. I hand them to you, Mr. Notary Public, and request you to attach true and correct copies thereof to my deposition. The originals I will transmit to Messrs. Dale & Bierer, my attorneys, for presentation to the Court in this action. The foregoing warrants belong to me and Mr. C. W. Turner and to no one else. No part of them has been paid.

JAMES A. KIRKWOOD.

(NOTE.—Copies of the warrants mentioned in this deposition are attached to the petition in this record. (See record page 40.)

The plaintiff offers in evidence the originals of the warrants identified by the witness Kirkwood, and the same are marked Exhibits "A" to "P" inclusive, the same being warrants numbered 1 to 10 inclusive, and No. 16, and No. 21 to 25 inclusive.

(NOTE.—Copies of these warrants will be found on page — of this record.)

It is admitted by the defendant, The City of Guthrie, and the defendants in this case, that prior to the time of bringing this action, no levy has been made for the payment or discharge of the sums due, as shown by the face of the warrants, and that no money is now or has been with the treasurer of the City of Guthrie, or in the treasury of The City of Guthrie, for the discharge of any of the obligations created under the terms of the warrants offered in evidence.

The plaintiffs here rest.

163 It is admitted by the plaintiff in this case, that the W. H. Gray, Receiver, mentioned in the third paragraph of defendants' answer, was the legally appointed, qualified and acting Receiver of the National Bank of Guthrie, and the successor of Harper S. Cunningham, to whom the warrants sued on and described in the

Alternative Writ herein were made payable, and as such Receiver, said W. H. Gray was the holder of said warrants, and said W. H. Gray during the summer of 1895 made demand upon the then mayor and council of said The City of Guthrie, in said Logan County, to levy a tax for the payment of said warrants, pursuant to the provisions of Article 1, Chapter 14, of the Statutes of Oklahoma of 1890.

It is further admitted that the allegations and facts pleaded and alleged in the fourth answer or return of defendants to the Alternative Writ, are true, as therein pleaded.

The Defendants here rest.

The Plaintiffs here rest.

Case Closed.

TERRITORY OF OKLAHOMA, *Logan County, ss:*

I, Thomas A. Higgins, do hereby certify that the above and foregoing is a true, full and complete transcript of all the evidence introduced on the trial of said cause.

Dated January 16, 1904.

THOMAS A. HIGGINS,
Court Reporter.

164 That the above and foregoing transcript of evidence contains all the evidence introduced and admitted upon the trial of said cause.

That thereupon, and on the said 23rd day of December, 1903, the said court rendered judgment and granted and allowed a peremptory writ of mandamus against said defendants which said judgment and peremptory writ of mandamus is in words and figures following:

In the District Court of Logan County, Oklahoma Territory.

No. 4196.

C. W. TURNER and JAMES A. KIRKWOOD, Plaintiffs,
v.
C. M. BARNES, Mayor of the City of Guthrie; GEORGE GREEN, W. A. PACKER, W. S. SPENCER, E. E. TALLMAN, E. L. HIRSCHI, J. E. PETERSEN, J. W. MCBRINE, J. E. DOUGLAS, G. N. PERKINS and A. P. PORTWOOD, Councilmen of the City of Guthrie, Logan County, Oklahoma Territory, Defendants.

Peremptory Writ of Mandamus.

And now, to wit, on this 23rd day of December, A. D., 1903, the same being one of the regular days of the November, 1903, term of the District Court of Logan County, Oklahoma Territory, the above entitled cause came on for trial, the plaintiffs being present by their attorneys Dale & Bierer, and the defendants being present by James Hepburn, City Attorney, and Lawrence & Huston,

and a jury being waived by both parties, the cause is tried to the court. Thereupon the plaintiffs and defendants each introduced their evidence, and rested their cause, and after hearing argu-
165 ments and due consideration thereof, the court finds that the plaintiffs filed their petition praying for a writ of mandamus against the defendants, and each of them, on July 23rd, 1903. That upon said petition, on August 7th, 1903, an Alternative Writ of Mandamus was duly issued and personally served as by law provided, upon each and all of said defendants. And the Court finds, from the evidence in the cause, that at the time the plaintiffs filed their petition in this cause, and at this time, the said plaintiffs are the owners and holders of the following described warrants of the City of Guthrie, to wit:

Warrant.	Amount.	Issued.	Due.	Rate.	From.
No. 1	$273.77	July 1, 1893	July 1, 1894	6%	June 3rd, 1891
No. 2	$273.77	July 1, 1893	July 1, 1895	6%	June 3rd, 1891
No. 3	$273.77	July 1, 1893	July 1, 1896	6%	June 3rd, 1891
No. 4	$272.77	July 1, 1893	July 1, 1897	6%	June 3rd, 1891
No. 5	$273.77	July 1, 1893	July 1, 1898	6%	June 3rd, 1891
No. 6	$554.15	July 1, 1893	July 1, 1894	6%	June 3rd, 1891
No. 7	$554.15	July 1, 1893	July 1, 1895	6%	June 3rd, 1891
No. 8	$554.15	July 1, 1893	July 1, 1896	6%	June 3rd, 1891
No. 9	$554 15	July 1, 1893	July 1, 1897	6%	June 3rd, 1891
No. 10	$554.15	July 1, 1893	July 1, 1898	6%	June 3rd, 1891
No. 16	$ 7.60	July 1, 1893	July 1, 1894	6%	June 3rd, 1891
No. 21	$ 34.80	July 1, 1893	July 1, 1894	6%	June 3rd, 1891
No. 22	$ 34.80	July 1, 1893	July 1, 1895	6%	June 3rd, 1891
No. 23	$ 34.80	July 1, 1893	July 1, 1896	6%	June 3rd, 1891
No. 24	$ 34.80	July 1, 1893	July 1, 1897	6%	June 3rd, 1891
No. 25	$ 34.80	July 1, 1893	July 1, 1898	6%	June 3rd, 1891

166 The court further finds that of the above mentioned and described warrants, numbers one, two, three, four and five were issued for indebtedness contracted by the sub-division of the City of Guthrie, known as Guthrie proper, and that the same were made by their terms and should be properly payable out of the taxes levied upon the property of said sub-division of the City of Guthrie. That of the above mentioned and described warrants, those numbered six, seven, eight, nine and ten, and each of them, were warrants issued for debts contracted by that sub-division of the City of Guthrie, known as East Guthrie, and that the same were, by their terms, made payable from levy of taxes upon the property situated and located in said sub-division of Guthrie, known as East Guthrie and the court further finds, that of the above mentioned and described warrants, that number sixteen was issued for the payment of debts contracted by that sub-division of the City of Guthrie, known as Capitol Hill, and that said warrant indebtedness should be paid from levies upon the property situated and located in that sub-division of the City of Guthrie, known as Capitol Hill.

That of the above mentioned and described warrants numbered twenty-one, twenty-two, twenty-three, twenty-four and twenty-five, the same were issued for an indebtedness created by what was known at that time as the Consolidated Schools of the four sub-divisions of

the City of Guthrie, to wit: The City of Guthrie, known as Guthrie Proper, East Guthrie, West Guthrie and Capitol Hill, said sub-divisions being consolidated into one school district and denominated and known as Consolidated Schools, and that the money and funds to pay said warrants so issued by said consolidated schools, as aforesaid,
should be paid out of a tax levied upon all of the property of
167 the four sub-divisions of the City of Guthrie, above named.

The court further finds that at the time of the creation of the indebtedness for which each and all of the above described warrants were issued, the different sub-divisions of the City of Guthrie were legally qualified under the law to create said indebtedness as exhibited and set forth in the outstanding warrants mentioned and described, and that the Consolidated Schools of the City of Guthrie were legally qualified to create the indebtedness set forth and designated in the several warrants above mentioned and described as having been issued by the Consolidated Schools of the City of Guthrie.

And, the court further finds that at no time since the issuance of said warrants, has the City of Guthrie, by its officers having charge of the levying of taxes to pay the indebtedness mentioned and set forth in the warrants hereinbefore described, levied any tax, or created any funds whatever for the payment of any part of said obligations or the warrants above described. That at all times since the same became due and payable, it was the duty of the Mayor and City Council of the City of Guthrie to make levies to provide funds for the payment of said warrant indebtedness and, in this they have at all times failed, and the court further finds the issues in this cause for the plaintiff, and finds that at the institution of this action, and at this time, it was and is the duty of the Mayor and Council of the City of Guthrie to levy taxes for the payment of the warrants herein mentioned and described, so issued as aforesaid, by said different sub-divisions, and made payable out of taxes levied upon said subdivisions in sums sufficient to discharge the obligations set forth and
contained in the warrants hereinbefore mentioned. And
168 also finds that it was the duty of the said Mayor and City
Council to levy a tax upon the entire property of the City of Guthrie, constituting the four sub-divisions of said city hereinbefore mentioned, for the creation of a fund for the payment of the warrants hereinbefore mentioned and described as having been issued by the Consolidated Schools of the City of Guthrie.

It is therefore, by the court considered, ordered and adjudged that the defendants and each of them be, and they are hereby required at the next meeting of the City Council of the City of Guthrie for the levying of taxes in said city, to levy taxes upon the various sub-divisions of the said City of Guthrie in such an amount as will create a fund sufficient to discharge the obligations of the various sub-divisions of the City of Guthrie, as evidenced by the warrants hereinbefore mentioned and described, and to also levy taxes in such an amount as will create a fund sufficient to discharge the obligations created by the indebtedness as exhibited by the warrants hereinbefore mentioned and described as having been issued by the Consolidated

Schools of the City of Guthrie. That such levies shall be made in an amount sufficient to pay the entire principal sum of the indebtedness and interest as by the terms of said warrants provided and for costs of this action. That this peremptory writ shall run not only upon the present Mayor and City Council of the City of Guthrie, the defendants in this cause, but shall be operative and binding upon your successors in office if any there be, at the time herein named for the levying of taxes under the law providing for the levy of taxes for the payment of the outstanding obligations of Cities in the Territory of Oklahoma, and hereof fail not at your peril. To which finding and judgment of the court so rendered as aforesaid, and to each of them, the defendants then and there duly excepted.

169 And, thereafter, on the same day, to wit, December 23rd, 1903, the defendants filed a motion for new trial, which motion was, after consideration by the court overruled, to which ruling of the court the defendants at the time duly excepted, and thereupon upon application of the defendants, said defendants were allowed ninety days in which to make and serve case made for the Supreme Court and the plaintiffs were allowed ten days in which to suggest amendments thereto, said case made to be settled and signed upon five days' notice in writing by either party.

Witness my hand this 23rd day of December, A. D. 1903.

JNO. H. BURFORD,
Judge of the District Court of Logan County, Oklahoma.

O. K.
D. & B.
LAWRENCE & HUSTON.

Endorsed as follows: # 4196. In the District Court of Logan County, Oklahoma Territory. C. W. Turner *et al.*, Plaintiffs, *vs.* C. M. Barnes, Mayor, *et al.*, Defendants. Peremptory Writ of Mandamus. Filed January 25, 1904. Thos. A. Neal, Clerk District Court.

170 That thereafter and on the said 23rd day of December, 1903, the said defendants filed their motion for a new trial which said motion for a new trial is in words and figures following:

In the District Court of Logan County, Oklahoma Territory.

C. W. TURNER ET AL., Plaintiffs,
vs.
C. M. BARNES, Mayor, ET AL., Defendants.

Motion for New Trial.

Now come the defendants herein by their attorneys, James Hepburn, City Attorney, and Lawrence & Huston, and move the court to vacate and set aside the decision heretofore rendered in said cause against them, and to grant a new trial herein for the following causes

which affect materially the substantial rights of said defendants, to wit:

First. That said decision is contrary to law.

Second. That said decision is not sustained by sufficient evidence.

Third. That said decision is contrary to the evidence.

Fourth. For error of law occurring at the trial and excepted to by the defendant.

Fifth. That the court erred in holding that the statutes of limitations had not run against the subject of the action.

Sixth. That the court erred in holding that said action was not barred by the statutes of limitations.

Seventh. That the court erred in holding that the cause of action herein alleged by the plaintiff was not a liability created by statute.

171 Eighth. That the court erred in holding that the cause of action herein did not accrue at the time the former action identical with this, was brought in this court by the predecessors in interest of said plaintiffs.

JAMES HEPBURN,
City Att'y, and
LAWRENCE & HUSTON,
Attorneys for Defendants.

O. K.
DALE & BIERER,
Att'ys for Pl'ffs.

Endorsed: No. 4196—C. W. Turner *et al. vs.* C. M. Barnes, Mayor, *et al.*—Motion for New Trial.—James Hepburn and Lawrence & Huston.—Filed Dec. 23, 1903. T. A. Neal, Clerk, by Wm. R. Benham, Deputy.

That thereupon on the said 23rd day of December, 1903, the court overruled the said defendants' motion for a new trial in said cause to which action of the court in overruling the said motion the defendants then and there excepted.

That thereupon the court gave and allowed the defendants ninety days from said 23rd day of December, 1903, within which time to make a case and to serve the same upon the plaintiffs in said cause, and allowed plaintiffs ten days in which to suggest amendments thereto, said case made to be settled and signed upon five days' notice in writing by either party.

172 The foregoing contains a true and correct statement of all pleadings, motions, orders, evidence, judgment, exceptions and proceedings in said cause from the beginning of the same to the granting of time in which to make and serve a case for the Supreme Court, and all of the proceedings had and done in said cause in the said District Court of Logan County, Oklahoma Territory.

JAMES HEPBURN,
City Att'y, and
LAWRENCE & HUSTON,
Attorneys for Defendants.

We the undersigned attorneys for plaintiffs, C. W. Turner and James A. Kirkwood, in the above and foregoing case do hereby accept service of the above and foregoing case made this 23 day of February, 1904.

DALE & BIERER,
Attorneys for Plaintiffs.

Filed May 25, 1904.
BENJ. F. HEGLER,
Clerk Supreme Court.

GUTHRIE, 2, 25, '04.

We have no amendments to suggest.

DALE & BIERER,
Att'ys for Pl'ffs.

MAY 25, 1904.

Service of summons in error is waived.

DALE & BIERER, *Att'ys.*

Filed May 25, 1904.
BENJ. F. HEGLER,
Clerk Supreme Court.

173 TERRITORY OF OKLAHOMA, *County of Logan, ss:*

This is to certify that the foregoing case made and the amendments thereto have been duly served in dur time and that the amendments suggested have been included in the case made and the same duly submitted to me for a settlement and signed, as required by law by the parties to said cause. That the above and foregoing case made is true and correct and contains a true and correct statement of all the pleadings, motions, orders, evidence, findings, judgment, rulings, exceptions and proceedings had and taken in said cause. And I hereby allow, certify, settle and sign the same as true and correct and hereby waive the clerk of the District Court of Logan County, Oklahoma Territory, to attest the same with the name and seal of said court and file the same of record in his office as provided by law.

Witness my hand at Guthrie in said County, Oklahoma Territory this 27 day of February, 1904.

JNO. H. BURFORD, *Judge.*

Attest:
T. A. NEAL,
[SEAL.] *Clerk District Court.*

Filed Feb. 27, 1904.
THOS. A. NEAL,
Clerk District Court.

Filed May 25, 1904.
BENJ. F. HEGLER,
Clerk Supreme Court.

Said case made is endorsed on back as follows, to wit: In the Supreme Court of Oklahoma Territory—C. M. Barnes *et al.*, Plaintiffs in error, *vs.* C. W. Turner *et al.*, Defendants in error—Petition in error—Filed Feb. 27, 1904, Thos. A. Neal, Clerk District Court—1537—Petition in error and Case Made—Filed May 25, 1904, Benj. F. Hegler, Clerk Supreme Court.

174 And thereafter, at the June, 1904, Term of said Supreme Court, on the Eleventh day of June, 1904, the following proceeding was had in said cause, to wit:

#1537.

C. M. BARNES, Mayor, ET AL., Plaintiffs in Error,
vs.
C. W. TURNER and JAMES A. KIRKWOOD, Defendants in Error.

Ordered by the Court, that this cause be submitted on briefs and record, as per stipulation.

175 And thereafter at the June, 1904, Term of said Supreme Court, on the First day of September, 1904, the following proceeding was had in said cause, to wit:

#1537.

C. M. BARNES, Mayor, ET AL., Plaintiffs in Error.
vs.
C. W. TURNER and JAMES A. KIRKWOOD, Defendants in Error.

And now this cause comes on for final determination and decision by the Court, upon the record and briefs submitted therein; And the Court having duly considered the same, and being fully advised in the premises, finds: That the decision of the lower court in this cause should be affirmed, at the cost of the plaintiffs in error.

It is therefore ordered and adjudged by the Court, that the decision of the lower court in this cause be and the same is hereby affirmed, at the cost of plaintiffs in error.

Opinion by IRWIN, J. All the Justices concurring, except Burford, C. J., who having tried the case below took no part in this decision, and Hainer, J., who having at one time been attorney for the City of Guthrie, took no part herein.

Said opinion reads in words and figures as follows, to wit:

176 Filed September 1, 1904.

In the Supreme Court of the Territory of Oklahoma, June Term, 1904.

No. 1537.

C. M. BARNES, Mayor; GEORGE M. GREEN, W. D. PACKER, W. S. SPENCER, E. E. TALLMAN, E. L. HIRSCHI, J. E. PETERSON, J. W. MCBRINE, J. E. DOUGLAS, G. N. PERKINS, and A. P. PORTWOOD, Councilmen of the City of Guthrie, Logan County, Oklahoma Territory, Plaintiffs in Error,

vs.

C. W. TURNER and JAMES A. KIRKWOOD, Defendants in Error.

Syllabus.

The statute of limitations does not run in favor of a municipal, or quasi municipal corporation, upon its outstanding obligations evidenced by warrants, until the corporation has provided a fund out of which payment of the same may be made.

Error from the District Court of Logan County.

Jno. H. Burford, Trial Judge.

Affirmed.

James Hepburn, City Attorney, and Lawrence & Huston, for plaintiffs in error.

Dale & Bierer, for defendants in error.

Statement of Facts.

This was a proceeding in *mandamus* brought by the defendants in error, Turner and Kirkwood, in the District Court of Logan County, against C. M. Barnes, as Mayor, and the other plaintiffs in error as councilmen of the City of Guthrie, to compel them to levy a tax upon the property of persons residing in the territory covered by the various old provisional governments or sub-divisions of the City of Guthrie, known as Guthrie Proper, East Guthrie, West Guthrie, Capitol Hill and the Consolidated School District, to provide for the payment of certain warrants that had been issued under the provision of Article One of Chapter Thirteen, of the Statutes of 1890, which warrants, together with the interest thereon, aggregate something over $7000.

This is the third time that these warrants have been brought before this court. W. H. Gray, Receiver of the National Bank of Guthrie, and successor to Harper S. Cunningham, on the 7th day

of September, 1895, commenced a *mandamus* proceeding, identical with this, in the District Court of Logan County, for the purpose of compelling the then Mayor and Councilmen of the City of Guthrie to levy a tax to provide a fund for the payment of certain warrants; the District Court allowed the writ, but the case was appealed to this court, and on the 12th day of February, 1897, was reversed. After this reversal nothing whatever was done by the holder of these warrants in the way of taking any steps towards collecting them, for more than four years thereafter. But after the decision in the case of the Guthrie National Bank *vs.* City of Guthrie was rendered in the Supreme Court of the United States, the holders of these warrants who had lain dormant during the years, made another move. The old case of Gray *vs.* Martin & Spencer, after it had been reversed and remanded, had been dropped from the docket, and on the 28th day of June, 1901, Turner and Kirkwood filed their motion as the successors in interest of Gray to have the case re-docketed, and also filed on the same day an application to have the case revived in their names, as the successors in interest of Gray, and on the same day they filed their motion to dismiss said action, which motion was sustained, and the case dismissed. Shortly after the dismissal of the original *mandamus* case, Turner and Kirkwood brought suit aganist the City of Guthrie upon
177 these same warrants, wherein a judgment against the City for the amount of the warrants was prayed for; they failed in this suit in the District Court and appealed to the Supreme Court where the judgment of the lower court was affirmed.

On the 23rd day of July, 1903, after the final decision in this court in the case of Turner and Kirkwood *vs.* The City of Guthrie, this *mandamus* proceeding was commenced against the Mayor and Councilmen, the same being in all respects similar to, and identical with, the original *mandamus* proceeding brought by W. H. Gray, Receiver, upon the same warrants, in 1895. The return and answer of the alternative writ, set forth the same defense as was alleged in the return to the proceedings brought by Gray, Receiver, and also alleges the bar to the action, of the statute of limitations. Trial was had before the court, wherein it was agreed that the allegations set forth in the fourth answer or return of the defendants to the alternative writ is true, and which shows the facts substantially as above set forth. Thereupon the court rendered judgment for the plaintiffs below and allowed a peremptory writ of *mandamus* against plaintiffs in error from which judgment and final order the plaintiffs in error appeal to this court.

Opinion of the Court by

IRWIN, *J.:*

The instruments in controversy are all time warrants, dated July 1, 1893. A copy of one of the warrants, of which the others are similar, is as follows:

"Warrant of the City of Guthrie, Oklahoma Territory.

$554.15. No. 6.

Treasurer of the City of Guthrie:

One year after date pay to the order of Harper S. Cunningham, Receiver National Bank, Guthrie, the sum of Five Hundred and Fifty Four and 15/100 dollars, with interest thereon at the rate of six per centum per annum, from June 3rd, 1891, from any moneys which shall arise from special levy for the payment of City Warrants issued under the provisions of Chapter No. 14, of the Statutes of Oklahoma, providing for the payment of indebtedness for the provisional governments of the cities of Guthrie, East Guthrie, West Guthrie, and Capitol Hill, upon the sub-division of Guthrie known as East Guthrie.

By order of the City Council July 1, 1893.

A. M. McELHINNEY, *Mayor.*

Attest:

E. G. MILLIKAN,
City Clerk."

The second assignment urged by plaintiffs in error for a reversal of this case, is that the action in *mandamus* to compel the Mayor and Councilmen of the City of Guthrie to levy a tax to create a fund to pay these warrants, accrued on the 9th day of September, 1895, the day W. H. Gray, Receiver, commenced his action in *mandamus* to compel the then Mayor and Council of the City of Guthrie to levy this same tax for the payment of these same warrants, and that consequently, at the time of the commencement of this action it was barred by the statute of limitations. With this contention we cannot agree. The statute of limitations is what is known in law as a statute of repose. It is a statute enacted as a matter of public policy to fix a limit in which all actions must be brought, or presumed to have been paid. The statute is intended to run only against those who are neglectful of their rights, and fail to use reasonable and proper diligence in the enforcement thereof. They are based upon the presumption of law that from the lapse of time it is fair to presume that the debt has been paid. In this case the warrants show upon their face that they were issued by what purports to be the City Council, and signed by what purports to be the Mayor, and attested
178 by what purports to be the Clerk; that they are evidences of indebtedness, and are entitled to be accepted as evidence of indebtedness; that they are to be paid from a special levy for the payment of city warrants under the provisions of Chapter 14, of the Statutes of Oklahoma providing for the payment of indebtedness of the provisional government of the cities of Guthrie, East Guthrie, West Guthrie, and Capitol Hill. Now when did, under these warrants, the right to demand payment thereof, accrue? Was it immediately upon the issuing of the warrants, or was it when the fund from which said warrants were to be paid was in the hands of the proper officer for payment thereof. The payment of these warrants

did not depend entirely upon the action of the holders thereof, but depended upon some affirmative action on the part of the officers of the city. The issuing of these warrants, making them payable out of a certain fund to be raised by a certain levy, indicates that a duty devolved upon the officers of the city to make the necessary orders and take the necessary steps which are prerequisite to the levying and collecting of that tax. Now can the officers of the city, when steps are taken which are necessary preliminaries to the collection of these warrants, be heard to take advantage of their own neglect of duty, by saying that because we have not performed the duty as the law required of us and made the necessary levy to provide the fund for the payment of these warrants, that consequently, on account of our neglect, the statute of limitations has run against the holders of these warrants so as to prevent their collection. We think this case comes clearly within the decision of this court in the Greer county case. That is, the Board of Commissioners of Greer County *vs.* Clarke & Courts, reported in the 70th Pacific, beginning at page 206. There, this court said:

"Where a warrant is issued by the officers of a municipal corporation, or a quasi-municipal corporation, and the creditor accepts the same relying on the ordinary modes of taxation to pay said obligation the corporation cannot be heard to say, upon an action to enforce the payment thereof, that it is barred by the statute of limitations, without first pleading and proving that it has provided a fund for the payment of such indebtedness. Hence a county cannot plead the statute of limitations to an action against it to enforce an obligation payable from a particular fund, without first showing that it has provided such fund."

In Robertson *vs.* Blaine county, 32 C. C. A. 512, 90 Fed. 63, 47 L. R. A. 459, it was held that a county cannot plead limitation to an action against it to enforce an obligation payable from a particular fund, without first showing that it has provided such fund.

In the case of Hubbell *vs.* City of South Hutchison, 68 Pac. 52, the Kansas Supreme court held that the statute of limitations will not start to run in favor of a city on its outstanding warrants until it has money in its treasury to satisfy such obligations. In the course of the opinion, the court said:

"This action was based upon certain written obligations, and in the absence of the intervening circumstances, would become barred within five years from the date of their issuance. It is the settled law of this state, however, that the statute of limitations does not run in favor of municipal or quasi-municipal corporations upon its outstanding obligations until the corporation has provided a fund with which payment thereof may be made."

In the case of School District No. 5 *vs.* First National Bank of Wabash, 66 Pac. 630, in a decision by the supreme court of the state of Kansas, we find the following language in the opinion.

"Statutes of limitation give the defendant the right to resist the payment of a demand based upon some act of negligence or omission of the plaintiff. But in the case at bar, the defendant would found its right to defeat the claim sued on by asserting its own negligence.

It has never set the machinery of the law in motion to collect the money required to meet its obligations. It has remained since the debt was contracted in a continued state of insolvency, created by its own act."

179 From the foregoing it will be seen that the reason assigned by the courts in refusing to permit the statute of limitations to be pleaded as a bar to recovery, in cases of this character, arises out of the fact that the defendants were, under the law, required to do some affirmative act; that is, to levy a tax creating a fund for the payment of indebtedness and the taking up of warrants, and if the warrant holder failed to present his warrant and secure the money thereon, the statute of limitations could be successfully interposed. But so long as there remained, under the law, some act to be performed by the municipality, such municipality has not performed its duty under the law, and the courts will not and ought not to permit them to interpose their failure to act as by law required as a defense to the payment of a just obligation.

We think in principle the Greer county case is identical with the case at bar. In the Greer county case, if any liability was created against Greer county, it was by virtue of a statute—the act of Congress which transferred the obligations of Greer county, Texas, to Greer county, Oklahoma. The warrants issued by Greer county, Texas, bore the date 1889, and 1892, and the action was not brought in the district court of Greer county until September, 1899. Suit might have been instituted in Greer county, Oklahoma, long prior to the date when it was commenced, and the same objections could as well have been taken against the warrants, by reason of the lapse of time, in the Greer county case as in the case at bar. Counsel for plaintiff in error in the Greer county case raised and relied upon the statute of limitations being a bar to recovery, and the warrants having been issued in the years 1889, to 1892, inclusive, it will be observed that more than five years elapsed from the date of their issuance until they became subject to the laws of Oklahoma Territory. No provision was ever made by Greer county, Texas, in the exercise of its taxing power, to pay the warrants which were the subject of that controversy. However, our own supreme court in passing upon that case used this language.

"In our opinion, where a warrant is issued by the officers of a municipal corporation, or a quasi-municipal corporation and the creditor accepts the same, relying on the ordinary modes of taxation, to pay said obligation, the corporation cannot be heard to say upon an action to enforce the payment thereof, that it is barred by the statute of limitations, without first pleading and proving that it has provided a fund for the payment of such indebtedness."

Now we think that an action in *mandamus* is simply a preliminary step towards the enforcing of payment of these warrants, and if the statute of limitations could not be urged as against the collection of the debt evidenced by the warrants, then it should not be urged as against the necessary preliminary steps towards the collection thereof. On page 154 of the record it is admitted by the defendant, the city

of Guthrie, and the defendants in this case, that prior to the time of bringing this action no levy has been made for the payment or discharge of the sums due, as shown by the face of the warrants, and that no money is now or has been with the treasurer of the city of Guthrie, or in the Treasury of the city of Guthrie, for the discharge of any of the obligations created under the terms of the warrants offered in evidence. The warrants on their face show that they were issued by the present municipal government of the city of Guthrie, on July 1, 1893, and were issued for the payment of an indebtedness created by the provisional governments of the city of Guthrie, and under the laws of Oklahoma Territory providing for the allowance and payment of such indebtedness.—Act of December 25th, 1890, page 156, Wilson's Digest, Volume 1, page 260. The question of the validity of the act and the liability of the city of Guthrie was affirmed by the supreme court of the United States in the case of The Guthrie National Bank *vs.* The City of Guthrie, 173 U. S. 528. Inasmuch as, under the law, it was the duty of the Mayor and Council of the city of Guthrie to levy a tax, it is wholly immaterial it seems to us, whether the duty arises by reason of a contractual obligation, or by reason of a statute. In either case, the duty is the same. In the Greer county case, however, the liability was created by statute, but we fail to see any difference in principle, and believe there is
180 nothing in the distinction, which is urged by counsel for plaintiffs in error. The duty of the Mayor and City Council to levy a tax is imperative, and the principle governing the application of the law rests upon the doctrine of negligence upon the part of the City Council and the Mayor.

As stated in the case of Freehill *vs.* Porter, 4th Pac. 646 (Cal.):

"It is urged, that as the coupons in question matured, according to their face, on the 1st of January, 1872, the statutes of limitations bars any proceeding on the part of the petitioner to enforce payment; that if the proper amount of taxes were not levied in any one year, such levy should have been compelled by *mandamus;* that if any step necessary to have the proper funds in the treasury had been omitted, a proceeding to compel such step was the proper course. We do not understand this to be the law applicable to this case. According to the act of April 25th, 1863, *supra*, no action could be maintained against the city on these bonds or coupons. By law, it was the duty of the city to make provision for the payment of the bonds and coupons, according to the statute under which they were issued, and, by omitting to perform such duty, the city could not create the defense of the statute of limitations. Not until the funds were in the treasury, properly applicable, would the statute begin to run; not until that period, would the petitioner have the right of action or proceeding against the treasurer. The contrary view would place it in the power of a municipality, in many cases, to avoid all payment of its debts, because, if by concert of action, each officer should omit to perform his duty, the time consumed in compelling such performance might be made to consume all the period of the statute, before the funds would

reach the treasury. We do not think the legislature intended such result."

In Lincoln county *vs.* Luning, 133 U. S. 529, we find a case very similar to the case at bar. A case where the indebtedness was to be paid out of a particular fund. The coupons were presented for payment and not paid. No money came into the treasury applicable thereto. The statutes of limitation were pleaded as a bar to recovery, and the Supreme Court of the United States said:

"When payment is provided for out of a particular fund to be created by the act of the debtor, he cannot plead the statute of limitations until he shows that that fund has been provided."

This language, it seems to us is especially applicable to the case under consideration. The legislature of the Territory of Oklahoma provided how the indebtedness of the old provisional government of the city of Guthrie should be determined and liquidated; and, in the act, provides that the present city of Guthrie should, through its municipal officers, levy taxes upon the different subdivisions which have created the obligations, and that such levies, so made, should create funds for the payment of the debts so created. This, it is admitted, the officers of the defendant city of Guthrie have failed entirely to do, and now they seek to interpose their negligence as a defense, and to do this under the name of the statute of limitations.

It would seem unnecessary to further cite authorities after the decided and emphatic manner in which our own supreme court in the Greer county case has decided this question. It would seem to us that this decision ought to settle the law upon this point in this Territory.

In answer to the suggestion that because of a former suit in mandamus on these same warrants, the statute of limitations began to run in 1895, we have to say: Under our law, any suit or proceeding may be dismissed without prejudice to a new action. The cause originally commenced by W. H. Gray, Receiver, was so dismissed. If then, the statute of limitations does not begin to run until such time as the city authorities provide a fund for the payment of the warrant indebtedness, the bringing of the second action in 1903 was in no manner prejudiced by the bringing of the first and its dismissal. It would be the same kind of a case as if a person should sue on a promissory note one year after the same became due; dismiss the action and bring another four years after the note became due. The statute of limitations would not prevent
181 the bringing of the second action because the statute did not bar the bringing of an action at the time the second action was brought. So too, in the case under consideration. If the supreme court of this Territory is right in the law as announced, and the statute of limitations does not begin to run until the municipality has created a fund, it is wholly immaterial how many actions are brought in the case; the limitation does not begin to run until the municipality has performed its duty in the first instance. In the case under consideration, it is admitted that the Mayor and City Council of the City of Guthrie have at no time

done that which was necessary in order to start the statute of limitations to running.

We are unable to distinguish any difference in principle between the case at bar and the Greer County case already decided by the Supreme Court of this Territory, and on the strength of that case, and the authorities there cited, the decision of the District Court is affirmed, at the costs of the plaintiffs in error. All the justices concurring except Burford, C. J., who having tried the case below, took no part in this decision, and Hainer, J., having at one time been attorney for the City of Guthrie, also took no part in this decision.

182 And afterwards at the June Term, 1904, on the Second day of September, 1904, the following proceeding was had in said cause, to-wit:

#1537.

C. M. BARNES, Mayor, ET AL., Plaintiffs in Error,
vs.
C. W. TURNER and JAMES A. KIRKWOOD, Defendants in Error.

Comes now A. H. Huston, of counsel for plaintiffs in error, and asks that he be allowed exceptions to the decision of the Court heretofore, to wit, September 1, 1904, rendered in this cause; and gives notice of an appeal to the Supreme Court of the United States. And said exception is hereby allowed and said appeal granted.

183 And afterwards, at the June, 1905, Term, on the Eighth day of September, 1905, the following proceeding was had in said cause, to wit:

#1537.

C. M. BARNES, Mayor, ET AL., Plaintiffs in Error,
vs.
C. W. TURNER and JAMES A. KIRKWOOD, Defendants in Error.

And now this cause comes on for consideration by the Court upon the application of plaintiffs in error to substitute the present City officials as parties to this action.

And leave is given.

184 *Certificate.*

In the Supreme Court of the Territory of Oklahoma.

UNITED STATES OF AMERICA, *Territory of Oklahoma, ss:*

I, Benj. F. Hegler, Clerk of the Supreme Court of the Territory of Oklahoma, do hereby certify that the foregoing 183 pages, numbered from 1 to 183, inclusive, are a true and complete transcript

of the record and all proceedings in said Supreme Court in the case of C. M. Barnes, Mayor, *et al.*, Plaintiffs in error, *vs.* C. W. Turner and James A. Kirkwood, Defendants in error, as the same remain upon the files and record of said Supreme Court.

In Testimony whereof I hereunto subscribe my name and affix the seal of said Supreme Court, at the City of Guthrie, this 29th day of December, 1905.

[Seal Supreme Court, Territory of Oklahoma.]

BENJ. F. HEGLER,
Clerk of the Supreme Court
of the Territory of Oklahoma.

185 In the Supreme Court of the United States.

JOHN W. DUKE, Mayor, and WILLIAM T. WALKER, EUGENE J. BLACKMAN, A. EDWARD JOHNSON, WILLIAM S. WELLS, JOHN TOWERS, ALMONT C. HIXON, WILLIAM T. MOORMAN, JOHN L. CALVERT, RICHARD H. KNIGHT and JOHN W. CAPERS, Councilmen of the City of Guthrie, Plaintiffs in Error,

vs.

C. W. TURNER and JAMES A. KIRKWOOD, Defendants in Error.

Statement of Errors Relied on by Plaintiffs in Error and of the Parts of the Record which They Think Necessary for the Consideration Thereof.

Come now the plaintiffs in error and make this their statement of the errors on which they intend to rely in their appeal herein:

That the Supreme Court of Oklahoma Territory erred in affirming the judgment of the District Court of Logan County, Oklahoma Territory.

That the Supreme Court of the Territory erred in holding and deciding that this action which was begun on the 23rd day of July, 1903, in the District Court of Logan County, Oklahoma Territory, was not barred by the Statute of Limitations.

That the Supreme Court of the Territory erred in not holding and deciding that this action in mandamus accrued on the 7th day of September, 1895, when W. H. Gray, Receiver, the predecessor in interest of the original plaintiffs, commenced his action in mandamus, identical with this, upon these same warrants, in the said District Court of Logan County.

186 That the Supreme Court of the Territory committed error in holding and deciding, absolutely and without qualification, that the Statute of Limitations does not run in favor of a municipal corporation upon outstanding warrants until the corporation has provided a fund with which to pay the same; that the court should have announced the true rule to be that a cause of action does not accrue against a municipal corporation, upon its warrants until the money for the payment of the warrants, is collected, *or time sufficient for the collection of the money has elapsed,* and the court should have

decided, as a matter of law, under the admitted facts in the case, that sufficient time had elapsed for the collection of the money on the 7th day of September, 1895, when W. H. Gray, Receiver predecessor in interest of plaintiffs, commenced the first action in mandamus, on these warrants, and that the action in mandamus then accrued, and the court should have further decided that the cause of action having accrued on the 7th day of September 1895, was barred by the Statutes of Limitations of Oklahoma Territory prior to the commencement of this suit on the 23rd day of July, 1903.

That the Supreme Court of Oklahoma Territory committed error in considering, and assuming the warrants in question in this case to represent an indebtedness of the City of Guthrie, Oklahoma.

And plaintiffs in error further, hereby designate the following parts of the record to be printed, and which they think necessary for the consideration of the errors complained of, viz:

	Pages.
Citation	1
Petition *to* writ of error	2
Assignment of Errors	4
Affidavit as to amount in controversy	6
Order allowing Writ of Error	7
Writ of Error	8– 9
Supersedeas Bond	10– 12
Petition in Error in District Court of Oklahoma	14– 15
First page of original case made	16
Caption and First Cause of action set forth in original petition	17– 20
Seventeenth Cause of Action set forth in plaintiffs' petition	52– 53
Copy of warrant made a part of First Cause of Action and marked No. 1	55
187 Copy of warrant made a part of Seventeenth Cause of action and marked No. 40	71
Statement of allowance of Alternative Writ of Mandamus, top of page	72
Alternative Writ of Mandamus so far as relates to Plaintiffs' First Cause of Action	72– 76
Statement of filing of return and answer to Alternative Writ of Mandamus	123–129
Exhibit "A" attached to Answer	130–152
Exhibit "B" attached to Answer	153–154
Exhibit "C" attached to Answer	155
Exhibit "D" attached to Answer	156–157
Exhibit "E" attached to Answer	158–159
Statement of filing reply	159
Reply	159
Statement of setting cause for trial	160
Transcript of testimony and admission of facts on appeal	161–164
Statement of allowance of peremptory writ of mandamus	164
Statement of judgment and allowance of peremptory Writ of Mandamus	164

Judgment and allowance of peremptory Writ of Mandamus. 164–169
Statement of filing a motion for a new trial..... 170
Motion for a new trial..... 170–171
Overruling motion for a new trial..... 171
Statement of contents of case made..... 172
Acceptance of service of case made..... 172
Certificate of original case made..... 173
Statement of proceedings in Supreme Court of Oklahoma.. 174
Judgment in Supreme Court of Oklahoma..... 175
Opinion rendered by Supreme Court of Oklahoma..... 176–181
Leave to substitute parties plaintiffs..... 183
Certificate 184

L. E. PAYSON,
LAWRENCE & HUSTON,
JAMES HEPBURN,
Attorneys for Plaintiffs in Error.

We hereby accept service and acknowledge the receipt of a copy of the above statement of error relied on by plaintiffs in error and the statement of the first part of the record which plaintiffs in error think necessary for the consideration of the errors complained of, and which they desire to have printed.

Dated this 15 day of February, 1906.

DALE & BIERER,
Attorneys for Defendants in Error.

188 [Endorsed:] No. 534. In The Supreme Court of The United States. J. W. Duke, *et al.* Pl. in error *v.* C. W. Turner, *et al.* Def's in err. Statement of errors relied on by plaintiffs in error; and of the parts of the record which they think necessary for the consideration thereof L. E. Payson, Lawrence & Huston, James Hepburn, Att'ys for Pl. in error. 534, 20,036, Feb., 1906.

189 [Endorsed:] File No. 20,036. Supreme Court U. S. October Term, 1905. Term No. 534. Jno. W. Duke *et al.* Pl'ffs in Error, *vs.* C. W. Turner *et al.* Statement of Errors relied on by pl'ffs in error, & designation of parts of record necessary to be printed. Filed Feb'y 19″, 1906.

Endorsed on cover: File No. 20,036. Oklahoma Territory supreme court. Term No. 178. John W. Duke, mayor, and William T. Walker *et al.*, councilmen of the city of Guthrie, plaintiffs in error, *vs.* C. W. Turner and James A. Kirkwood. Filed January 6th, 1906. File No. 20,036.

FILE COPY.

FILED
DEC 31 19
JAMES H. McKEN

IN THE

SUPREME COURT

OF THE

UNITED STATES

JOHN W. DUKE, Mayor, and WILLIAM T. WALKER, EUGENE J. BLACKMAN, A. EDWARD JOHNSON, WILLIAM S. WELLS, JOHN TOWERS, ALMOMT C. HIXON, WILLIAM T. MOORMAN, JOHN L. CALVERT, RICHARD H. KNIGHT and JOHN W. CAPERS, COUNCILMEN OF THE CITY OF GUTHRIE, OKLAHOMA TERRITORY,

Plaintiffs in Error

vs

C. W. TURNER and JAMES A. KIRKWOOD

Defendants in Error.

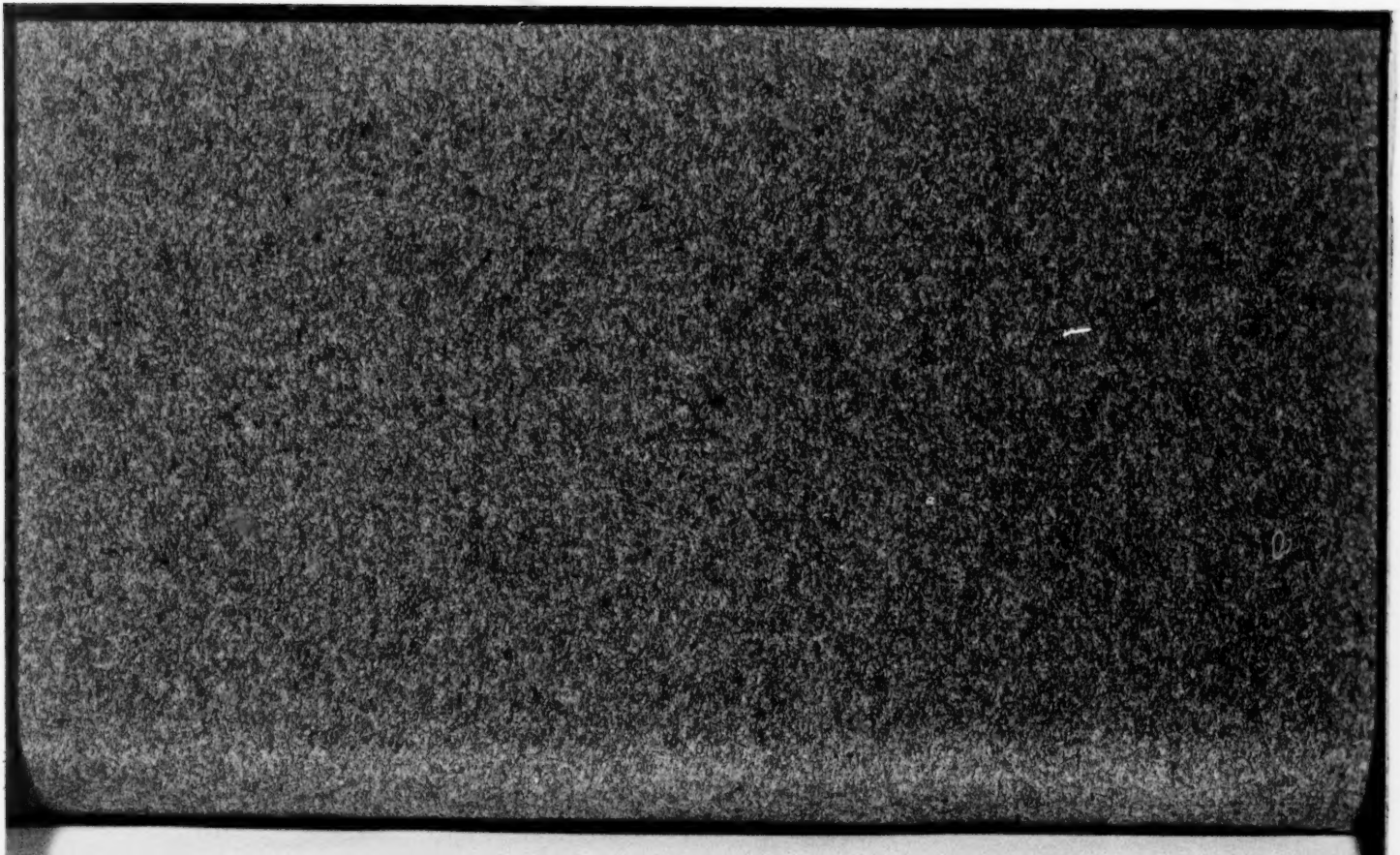
October Term 1906

No. 178

(20,036)

BRIEF OF PLAINTIFFS IN ERROR

L. E. PAYSON
Wm. R. BENHAM
JAS. HEPBURN and
LAURENCE & HUSTON
Attorneys for Plaintiff in error.



IN THE

SUPREME COURT

OF THE

UNITED STATES

JOHN W. DUKE, Mayor, and WILLIAM T. WALKER, EUGENE J. BLACKMAN, A. EDWARD JOHNSON, WILLIAM S. WELLS, JOHN TOWERS, ALMOMT C. HIXON, WILLIAM T. MOORMAN, JOHN L. CALVERT, RICHARD H. KNIGHT and JOHN W. CAPERS, COUNCILMEN OF THE CITY OF GUTHRIE, OKLAHOMA TERRITORY, *Plaintiffs in Error*	October Term 1906
vs	
C. W. TURNER and JAMES A. KIRKWOOD *Defendants in Error.*	No. 178 (20,036)

BRIEF OF PLAINTIFFS IN ERROR

STATEMENT OF THE CASE.

This action, being a proceeding in mandamus, was commenced in the District Court of Logan County, Oklahoma Territory, on the 23rd day of July, 1903 (Rec. p. 10) by the defendants in error, Turner and Kirkwood, against C. M. Barnes,

Mayor, and certain others as Councilmen of the City of Guthrie, Oklahoma Territory, by filing their petition in said court. (Rec. p. 11) wherein they alleged the official capacity of the Mayor and Councilmen, their duty as such officials to levy a tax upon the property of persons residing in the Territory covered by the various old provisional governments known as Guthrie Proper, East Guthrie, West Guthrie and Capitol Hill, now embraced in the City of Guthrie, to provide for the payment of certain warrants that had been issued under the provisions of a special Act of the Territorial Legislature approved December 25, 1890, and also alleging the refusal of said officials to make such levy and praying for a Writ of Mandamus to compel the officials to make the levy. To this petition and the alternative writ the Mayor and Councilmen of the City of Guthrie, the predecessors in office of the plaintiffs in error, filed an answer and return (Rec. p. 18), in the third paragraph of which the Statute of Limitations was pleaded (Rec. p. 19). It was alleged in the answer that the levy sought to be compelled, was a liability imposed by Statute, and should have been brought within three years from the time the action accrued, and that the action had accrued more than three years before it was brought, and in fact it had accrued on the 7th day of September, 1895, upon which date the then holder of said warrants had commenced an action in mandamus, in said court to compel the Mayor and Councilmen of said City of Guthrie to levy a tax to pay the same; and in the fourth paragraph of which, it was alleged that one W. H. Gray, as Receiver of the National Bank of Guthrie, was the predecessor in interest of the said Turner and Kirkwood, in said warrants, and that he owned and held the same in 1895, and that he commenced an action in mandamus, identical with this, on the 7th day of September, 1895, to compel the Mayor and Councilmen of the said City to make a levy to pay said warrants, and that a peremptory writ was awarded by said District Court, and the cause appealed to the Supreme Court of the Territory, and reversed, and remanded to the District Court (See Martin, *et al* vs. Territory of Oklahoma *ex rel* W. H. Gray, Receiver, 5 Okla. 188), where it was revived in the names of Turner and Kirkwood, and by them dismissed

on the 28th day of June, 1901, and it was further answered that this action was not brought within one year after such dismissal. Copies of the pleadings and other proceedings in the first mandamus suits were attached as exhibits to the answer (Rec. p. 22 and 37 inclusive.)

Turner and Kirkwood replied to the answer and return, denying all the material allegations therein, and the case was tried in the District Court of Logan County on the 23rd day of December, 1903. Upon the trial of the case it was admitted by the defendants, the City officers, that prior to the time of bringing the action no levy had been made for the payment or discharge of the warrants described and that no money was then or had been in the hands of the Treasurer of the City of Guthrie to pay any of said warrants (Rec. p. 39), and it was admitted by the plaintiffs, Turner and Kirkwood, that the W. H. Gray, Receiver, mentioned in the third paragraph of defendants' answer was the legally appointed Receiver of the National Bank of Guthrie and successor to Harper S. Cunningham, to whom the warrants described in the Alternative Writ were issued, and that as such Receiver, W. H. Gray was the holder of said warrants, and that during the summer of 1895 he made demand upon the then Mayor and Councilmen of the said City of Guthrie to levy a tax for the payment of said warrants, pursuant to the provisions of said special Act of the Territorial Legislature, and it was further admitted that all the allegations and facts pleaded in the fourth answer or return to the Alternative Writ, relating to the bringing of the first suit in mandamus by Gray, Receiver, its appeal to the Supreme Court, reversal and subsequent dismissal by Turner and Kirkwood, were true as pleaded (Rec.p. p. 39 and 40.)

The warrants for the payment of which, the tax levy was sought to be enforced, are seventeen in number and are numbered, dated, are in amount and due as shown by the following list:

No.	Date.	Amount	Due.
1	July 1, 1893	$273.77	July 1, 1894
2	July 1, 1893	273.77	July 1, 1895

3	July 1, 1893	273.77	July 1, 1896
4	July 1, 1893	273.77	July 1, 1897
5	July 1, 1893	273.77	July 1, 1898
6	July 1, 1893	554.15	July 1, 1894
7	July 1, 1893	554.15	July 1, 1895
8	July 1, 1893	554.15	July 1, 1896
9	July 1, 1893	554.15	July 1, 1897
10	July 1, 1893	554.15	July 1, 1898
16	July 1, 1898	7.60	July 1, 1894
21	July 1, 1893	34.80	July 1, 1894
22	July 1, 1893	34.80	July 1, 1895
23	July 1, 1893	34.80	July 1, 1896
24	July 1, 1893	34.80	July 1, 1897
25	July 1, 1893	34.80	July 1, 1898
40	July 1, 1893	11.22	July 1, 1898

All of these warrants bear interest at the rate of six per cent from June 3rd 1891, and are all similar in form. A copy of one of them being as follows:

"Warrant of the City of Guthrie, Oklahoma Territory.

"554.15 No. 6.

"Treasurer of the City of Guthrie.

"One year after date pay to the order of Harper S. Cunningham, Receiver National Gank, Guthrie, the sum of five hundred and fifty four and 15-100 dollars with interest thereon at the rate of six per centum per annum, from June 3rd, 1891, from any moneys which shall arise from special levy for the payment of City warrants issued under the provisions of chapter No. 14, of the Statutes of Oklahoma, providing for the payment of indebtedness of the provisional governments of the cities of Guthrie, East Guthrie, West Guthrie, and Capitol Hill, upon the sub-division of Guthrie known as East Guthrie.

"By order of the City Council July 1, 1893.

"A. M. McELHINNEY, Mayor.

"Attest, E. G. Millikan, City Clerk.

Judgment was rendered by the District Court, awarding a peremptory Writ of Mandamus against the Mayor and Coun-

cilmen (Rec. p. 40.) and after a motion for a new trial (Rec. p. 43) was filed, considered and overruled, the cause was taken by proceedings in error to the Supreme Court of the Territory where it was urged that the District Court had erred in rendering judgment allowing a peremptory writ and had erred in holding that the Statute of Limitations had not barred the action in mandamus, and in holding that the action had not accrued at the time W. H. Gray, Receiver, the predecessor in interest of Turner and Kirkwood, commenced the first action in mandaums.

The Supreme Court of the Territory affirmed the judgment of the District Court (Rec. p. 46), and in the opinion handed down by the Supreme Court, in support of its judgment of affirmance, it is held "that an action in mandamus is simply a preliminary step toward the enforcing of payment of the warrants, and if the Statute of Limitations could not be urged as against the collection of a debt evidenced by the warrants, then it should not be urged as against the necessary preliminary steps towards the collection thereof (Rec. p. 51.)

Afterwards, leave was taken to substitute the present Mayor and Councilmen of the City of Guthrie, in place of those who had gone out of office (Rec. p. 54), and they prosecute this writ of error, in this court.

SPECIFICATION OF ERRORS.

The assignment of errors, filed in connection with plaintiffs in error's petition for a writ of error, appear on pages 3 and 4 of the printed record and allege error on the part of the Supreme Court affirming the judgment of the District Court allowing the peremptory Writ of Mandamus and in holding that the action was not barred by the Statute of Limitations, and that this action did not accrue until there was money in the treasury to pay the warrants described etc. But more specifically speaking, we contend as follows:

1. That the rule, "that in an action upon a municipal warrant, the Statute of Limitations does

not commence to run against such action until there is money in the treasury to pay the same," does not apply to an action in mandamus to compel a tax levy to pay such warrant.

2. That, even in an ordinary suit for a money judgment on a municipal warrant against the municipality issuing it such action accrues when the moneys are in the treasury to pay it, *or when sufficient time has elapsed for the collection of the same,* and that the Statute of Limitations begins to run from the time of such accrual.

3. That in this case, it should be determined as a matter of law, that sufficient time had elapsed to collect the money, at the time the first suit in mandamus was brought.

4. That this action is upon a liability created by statute, and is barred by the three years limitations statute.

5. That this action not having been commenced within one year from the time the first action was dismissed, it is barred.

6. That all of said warrants having a fixed time of payment, an action accrued on each, when payment was not made at the time fixed.

OKLAHOMA STATUTES.

The special Act of the Oklahoma Legislature, under which said warrants were issued is as follows:

"An Act for the purpose of Providing for the Allowance and Payment of the indebtedness heretofore created by the people and cities of Guthrie, East Guthrie, West Guthrie and Capitol Hill, now consolidated into the village of Guthrie. (Took effect December 25, 1890.)

"*Be it enacted by the Legislative Assembly of the Territory of Oklahoma*:

"Section 1. That the district judge of Logan county is

hereby empowered to appoint three disinterested persons to act as a commission or referees to inquire into and pass upon all claims and demands of every character heretofore issued by the city governments mentioned in the caption of this act, for all purposes.

"Sec. 2. That the owners and holders of any kind of scrip, warrants or other evidence of indebtedness heretofore issued by the city governments of Guthrie, East Guthrie, West Guthrie and Capitol Hill, shall present their claims to the commissioners or referees, to be appointed by the district judge, under oath, stating that the same is a bona fide claim, that they performed the labor or advanced the money or furnished the materials or purchased same for a valuable consideration, and that they believe the city, issuing the same did so for necessary expenses incurred in running the city government, and said master shall hear further evidence if he deem necessary before allowing the same.

"Sec. 3 The commission or referees shall keep a record of all claims filed with them for allowance and keep their office open during the hours of nine o'clock in the morning and four o'clock p. m., and shall be allowed sixty days to hear and determine all claims, or longer if the district judge so orders. Said commission or referees shall immediately after this appointment extend ten days notice in some newspaper published in the village of Guthrie, notifying all parties holding or owning any claims mentioned in this act to present the same to them for allowance; and all persons who fail to present their claims within thirty days from date of first publication mention in this section shall be forever precluded from so doing hereafter.

"Sec. 4. That after the commission or referees shall have passed upon and allowed any and all claims mentioned in this act, they shall make a report to the district court of same showing the names and amounts allowed by them, and also all claims and the names of persons and amounts disallowed by them, for approval or disapproval by the district judge. And all claims allowed and approved by the district judge shall be certified to the mayor and council of the village of Guthrie, who are hereby authorized and directed to issue warrants upon the village and payable by the villages to the holders and owners, payable in installments each of the amounts to be in one, two, three, four and five years to bear interest at the rate of six

per cent per annum from the date of the allowance by the commission or referees, and said mayor and council of the village of Guthrie shall levy a tax upon the property of the residents of said village to pay the warrants herein referred to, levying same upon each sub-division heretofore constituting Guthrie, East Guthrie, West Guthrie and Capitol Hill according to the amount of indebtedness created by the city councils the mayors and school boards heretofore acting for and in behalf of the people resident of said cities. Each of said cities to be liable for and taxable under this act for the amount of indebtedness created by them.

"Sec. 5. That said commission or referee shall be allowed such compensation as the district judge may allow them for the services to be performed by them under this act, and the village of Guthrie shall pay the same to the said commission or referees upon the order of the district judge.

That this act take effect and be in force from and after its passage and approval."

(See Okla. Rev. Stat. 1893 page 156.)

The Oklahoma Statutes of Limitation applicable to this discussion are found in the following sections of the Code of Civil Procedure, 2nd Vol. Wilson's Revised Statutes, page 973-975 inclusive, and are as follows:

"Section 18. Civil actions, other than for the recovery of real property, can only be brought within the following periods, after the cause of action shall have accrued, and not afterwards:

"First. Within five years, an action upon any contract, agreement or promise in writing.

"Second. Within three years: an action upon a contract not in writing, express or implied; *an action upon a liability created by statute, other than a forfeiture or penalty.*

"Third. Within two years: an action for trespass upon real property; an action for taking, detaining or injuring personal property, including actions for the specific recovery of personal property; an action for injury to the rights of another not arising on contract, and not hereinafter enumerated; an action for relief on the ground of fraud—the cause of action in

such case shall not be deemed to have accrued until the discovery of the fraud.

"Fourth. Within one year: an action on a foreign judgment; an action for libel, slander, assult, battery, malicious prosecution, or false imprisonment; an action upon a statute for penalty or for forfeiture, except where the statute imposing it prescribes a different limitation.

"Fifth. An action upon the official bond or undertaking of an executor, administrator, guardian, sheriff, or any other officer, or upon the bond or undertaking given in attachment, injunction, arrest, or in any case whatever required by the statute, can only be brought within five years after the cause of action shall have accrued.

"Sixth. An action for relief, not hereinbefore provided for, can only be brought within five years after the cause of action shall have accrued.

"Sec. 20. An action shall be deemed commenced, within the meaning of this article, as to each defendant at the date of the summons which is served on him, or on a co-defendant, who is a joint contractor or otherwise united in interest with him. Where service by publication is proper, the action shall be deemed commenced at the date of the first publication. An attempt to commence an action shall be deemed equivalent to the commencement thereof, within the meaning of this article, when the party faithfully, properly and diligently endeavors to procure a service; but such attempt must be followed by the first publication or service of the summons within sixty days.

"Sec. 23. If any action be commenced within due time, and a judgment thereon for the plaintiff be reversed, or if the plaintiff fail in such action otherwise than upon the merits, and the time limited for the same shall have expired, the plaintiff, or, if he die, and the cause of action survive, his representatives may commence a new action within one year after the reversal or failure."

ARGUMENT.

1. *That the rule, "that in an action upon a municipal warrant, the Statute of Limitations does not not commence to run against such action until there*

is money in the treasury to pay the same," does not apply to an action in mandamus to compel a tax levy to pay such warrant.

To say that an action in mandamus against the officers of a municipality to compel them to levy a tax to raise a fund to pay a municipal warrant, will not accrue until such money is already in the treasury with which to pay the warrant, is an absurdity. It is equivalent to saying that a suit on a promissory note will not lie, until the note has been paid. It is saying that the thing must be first done, before a suit will lie to enforce the doing of it.

The logical result of applying such a rule in this case, would necessitate the holding that this action in mandamus had not yet accrued. The reasoning of the Supreme Court of the Territory to the effect "that an action in mandamus is merely a preliminary step toward the enforcing of payment of these warrants, and if the statute of limitations could not be urged as against the collection of the debt evidenced by the warrants, then it should not be urged as against the necessary preliminary steps towards the collection thereof," is neither logical nor is it a correct statement of the law. Because a warrant holder may wait until there is money in the treasury before bringing suit to enforce the collection of his warrant, it does not follow that he may wait until after the expiration of the Statute of Limitations, before making an effort to have the money placed in the treasury. The Statute of Limitations prescribe the time within which every action must be brought; each action must stand or fall by itself, and it is of no consequence as to what may be its relation to some other action, whether preliminary or otherwise. If it is merely a preliminary step, then the preliminary step must be taken within the time prescribed by law. In fact, it is not a mere preliminary step, it is the only remedy the defendants in error have ever had, and they should have used it promptly and within the period of limitation. No relation of debtor and creditor ever existed between the plaintis in error and defendants in error. These warrants do not even represent an indebtedness of the muni-

cipality of which the plaintiffs in error, are officers. After the dismissal of the first mandamus suit, Turner and Kirkwood brought a straight suit against the City of Guthrie upon these same warrants, wherein they sought a money judgment against the City for the amount thereof. The Supreme Court of the Territory in affirming the judgment for the defendant said:

"The warrants here sued on were not issued in payment of any debt contracted by the city of Guthrie, but are created as legal obligations entirely by the Act of the Territorial Legislature, and, according to the interpretation put upon that act by the Supreme Court of the United States, they were claims against the municipal corporation which is no legal obligation, but which the legislature thinks has sufficient equity to make it proper to provide for their investigation and payment. Thus it will be seen that prior to the statute these warrants would not have been of any legal effect against anybody, but were, by the statute, made an obligation against the property of residents of Guthrie Proper, East Guthrie, West Guthrie and Capitol Hill, and this fact appears upon the face of each warant."

Turner et al. vs. City of Guthrie, 13 Okla. 26.

One of the best considered decisions upon this question, and one which clearly distinguishes the case at bar from those cases which hold that the Statute of Limitations does not run against a municipal warrant until the money is in the treasury to pay it, is the case of Barnes vs. Glide et al. 117 Cal. 1, 48 Pac. 804; It was an action in mandamus to compel Glide and his co-defendants, who were trustees of a swamp-land district, to levy a tax to pay certain warrants. We quote the following from the opinion:

"A proceeding in mandamus between two private parties to enforce a money obligation, where there is no statutory provisions giving it a different character, is generally considered as a mere action at law, in which case all ordinary rules of practice, including the statute of limitations, apply. In Com. Wealth v. Dennison, 24 How. 97, the Supreme Court of the United States says:'It is equally well settled that mandamus in modern practice is nothing more that an action at law between the parties.'

"The date of the last warrant set up in the complaint is

1881,—more than fourteen years before the commencing of the action. The present board of trustees, who are made defendants, do not appear to have occupied that position for a longer period than six months prior to the commencment of the suit. The warrant sued on was issued, if at all, by other trustees, who were in office from fifteen to eighteen years before this proceeding was instituted. They may have been issued illegally; they may have been issued without consideration and fraudulently; * * * And the evident purpose of the statute of limitations is to prevent such a condition of affairs and to preclude parties from disturbing that repose which is intended to be final after the lapse of certain periods of time designated in the statute itself."

"Appellant relies greatly on Freehill vs. Chamberlain, 65 Cal 603, 4 Pac. 646, but that case is not pertinent to the case at bar, that case was simply mandamus to the Treasurer of the City of Sacramento to compel him to pay the interest on certain bonds. * * * All that the court decided in Freehill vs. Chamberlain was that no cause of action in mandamus against the City Treasurer had accrued until there was money in said fund, and that consequently the statute of limitations did not commence to run while there was no money in said fund with which the treasurer could pay said interest. It was not a proceeding which might have been commenced fifteen years before it was instituted."

That case, being a proceeding which might have been instituted fifteen years before it was, the court held that the statute of limitations had run against it, and so we say in the case at bar that it is a case which not only might have been, but actually was commenced the first time, eight years before this second action in mandamus was commenced, and that therefore, the statute of limitations has run against it.

The case of Prescot vs. Gonser, 34 Iowa, 175, was an action in mandamus by a warrant holder to compel the county clerk to attach his seal to a warrant; this case is an exemplification of the distinction between a suit on a warrant and an action in mandamus to compel the performance of an official duty; the court in the opinion said:

"The demand of the plaintiff was not necessary to create the duty, but only as a preliminary step to the enforcement

of the remedy for a breach of official duty, which breach was complete without a demand. The demand was to be made by the plaintiff. This act devolved upon him as much as the act of procuring an original notice to be served upon the defendant, and each was necessary as preliminary to the writ of mandamus. To allow him to suspend the operation of the statute of limitations by his own neglect to make demand, would be to permit him to take advantage of his own wrong. * * *

"We are of the opinion that the clause of the statute above quoted is applicable to this case. The act complained of is 'the omission of an official duty,' by 'a public officer, whereby he incurred a liability.' He rendered himself liable to the action of mandamus, by a failure to perform a duty specially enjoined by law upon him in his official capacity. This liability he incurred by the omission of an official duty, which brings the case within the above mentioned provision of the statute. Holding that the action was barred in three years from the time when the cause of action accrued, and that the statute commenced to run when the plaintiff had a right to demand performance of the duty omitted, and immediately bring his action, if performance was refused, the demurrer was properly sustained on this ground, and the judgment of the court below is affirmed."

And so the case at bar is not an ordinary suit on warrants to recover a money judgment, but the act complained of is the omission of official duty by certain public officers whereby they incurred a liability. They rendered themselves liable to the action of mandamus, by a failure to perform a duty specially enjoined in law upon them in their official capacity. In the eighth paragraph of the petition, of the plaintiffs below and also in the Writ it is alleged that it was the duty of the mayor and city council to levy this tax, and in the ninth paragraph it is alleged that they failed to levy it (See rec. 17) and this failure to so levy the tax is the act complained of, the real gist of this action in mandamus. And it will avail the defendants in error nothing, that they allege that they made a demand for this levy in July 1903, in the face of the fact that their predecessor had made such demand prior to the beginning of the first suit in 1895, (See plaintiff's admission, rec. page 34 & 40) and, anyway, under the authority above cited, one cannot pre-

vent the statute of limitations from running by failing to make demand.

The gist of the action being the failure of the mayor and city council to make the levy which occurred in 1895 and prior thereto, and this action not having been commenced until July, 1903, it follows that this action, as in the case above cited, was barred by the three year statute of limitations.

2. *That, even in an ordinary suit for a money judgment on a municipal warrant against the municipality issuing it such action accrues when the moneys are in the treasury to pay it, or when sufficient time has elapsed for the collection of the same, and that the Statute of Limitations begins to run from the time of such accrual.*

3. *That in this case, it should be determined as a matter of law, that sufficient time had elapsed to collect the money, at the time the first suit in mandamus was brought.*

Those cases which hold that the Statute of Limitations does not run against an action upon a municipal warrant, until there is money in the treasury with which to pay the same, are all based upon the proposition that the cause of action does not accrue until the money is in the treasury, or sufficient time has elapsed to collect it, but none of them go to the extent of holding that where the cause of action has accrued, and a first action actually been brought, and afterwards dismissed, and a new action commenced after the period designated in the statute had expired, that the statute does not run against such new action. It will be observed of course that the reversal, and subsequent dismissal of the first action in mandamus was not for the reason nor upon the ground that the action had not yet accrued, nor because it was prematurely brought (Martin et al vs. Gray, Receiver, 5 Okla. 188).

The leading cases which establish this general rule are King Iron Bridge Co. vs. Otoe, 124 U. S. 459, and Lincoln Coun-

ty vs. Luning, 133 U. S. 529. In the Iron Bridge Co. vs. Otoe, it is said:

"Whoever deals with a county and takes in payment of his demand a warrant in the character of these, no time of payment being fixed, does so under the implied agreement that if there be no funds in the treasury out of which it can be satisfied, he will wait until the money can be raised in the ordinary mode of collecting such revenues. He is presumed to act with reference to the actual condition of the laws regulating and controlling the business of the county. He cannot be permitted, immediately upon the receipt of such warrant, to resort to the courts to enforce payment by judgment and execution, without regard to the condition of the treasury at the time, or the laws by which the revenues are raised and disbursed."

"The cause of action did not accrue when the payment was refused, but only when the money for this payment is collected, *or time sufficient for the collection of the money has elapsed.* We cannot say, as a mater of law, that this was more than five years before the comencement of the action."

This decision is based upon the proposition that the cause of action would not, and did not accrue until there was money in the treasury to pay the warrants, or until a sufficient time had elapsed for the collection of the same. Reasoning from this proposition, the consistent and logical conclusion is reached, that such an action, is not barred by the statute. But in the case at bar there is no question but that the cause of action accrued in 1895, because the first action was then commenced. In a case where the court can hold that an action has not accrued until a certain time or the happening of a certain contingency, it is consistent and logical to hold that the statute had not run until the expiration of the statutory period after such time or the happening of such contingency, but whenever an action accrues, the statute certainly begins to run, and will continue to run until it operates as a bar, unless the action is commenced within the statutory period.

Two things will start the running of the statute; one is the money in the treasury to pay the warrant, and the other the elapsing of sufficient time to collect the money. The holder

of the warrant in the case at bar decided that a sufficient time had elapsed to collect the money in Septmber, 1895, and no one has disputed him, and having so decided, and having acted thereon by bringing his first suit, he and his successors are now estopped from saying that a sufficient time had not then elapsed, or that the action did not then accrue, or that the statute did not then begin to run.

In the case of Lincoln County vs. Luning, 133 U. S. 529, it was held that a later act of the legislature providing for registration and payment in a particular order, was a new provision for the payment of the bonds in controversy, which was accepted by the creditor, and created a new right upon which he might rely. It is also said in that case, "That when payment is provided for out of a particular fund to be created by the act of the debtor, he cannot plead the statute of limitations until he shows that that fund has been provided." But in the case at bar these plaintiffs in error were not the debtors, nor is the municipality, whose officers they are, the debtor, as has been conclusively determined in Turner et al. vs. City of Guthrie, supra. It has not been mere neglect nor delay on the part of the mayor and council to levy this tax. It is a part of the judicial history of this Territory, that the payment of these old warrants, has been steadily resisted, and the gauge of battle was thrown down when the time came to make the levy. The warrant holder demanded that the levy be made, the mayor and council refused, and thereupon the first action of mandamus was commenced. It was not contended, or even suggested by anybody, on either side, at that time, that the action in mandamus had not then accrued.

The case of Freehill vs. Chamberlain, 65 Cal. 603, 4 Pac. 646, is cited with approval in the Luning case, but we have already observed how the Freehill case is distinguished from a case like the one at bar by the same court, in the later case of Barnes vs. Glide, supra.

We submit that there is a clear and well defined distinction between those cases where it is held that an action in mandamus does not accrue against a treasurer to compel him to pay

money on warrants, until there is money in his hands to pay, or where it is held in a suit on a warrant, issued by a municipality, that the action does not accrue until there is money in the treasury, or a reasonable time has elapsed for the money to have been collected by the ordinary governmental machinery, and the case at bar. In the Freehill case, the treasurer could have no duty to perform, and hence no action could accrue against him until there was money in his hands to pay, and as in the Greer county case, or the case of Iron Bridge vs. Otoe, where it was held that no action had accrued against the municipalities until it appeared that there was either money in the treasury, or time sufficient had elapsed for the officers of the municipalities to levy the proper tax and collect the money. But in the case at bar it is conclusive, that this cause of action accrued to the warrant holders in 1894 or in 1895 at the latest because he then brought it the first time..

In those cases where by a reasonable method of construction under a given state of facts, the courts have been able to say that the cause of action had not accrued, they could logically and consistently hold that the statute of limitations had not run, but it would be illogical and not justified by any process of reasoning to hold that where the cause of action had accrued longer ago than the statutory period, that nevertheless, the statutes of limitations would not appiy, and could not operate as a bar. A statute of limitation is as much the law of the land as any other law, and it cannot be arbitrarily set aside or abrogated. To hold that an action had accrued, and at the same time hold that the statute of limitations did not commence to run against it from the time it accrued, would be an arbitrary abrogation of the limitation statute, which cannot be supported or defended by any well considered authority.

4. *That this action is upon a liability created by statute, and is barred by the three year limitations statute.*

It has been finially determined in the case of Turner and Kirkwood vs. The City of Guthrie, supra, that this is a liability created by statute, and hence the three years period of limi-

tation, as provided in the Second sub-division of Section 18 of the Code, must apply.

Commissioners of Graham County vs. Van Slyck, 52 Kan. 622, is an instructive case upon this point. It was an action brought by the county against an ex-county clerk and his bondsmen, to recover fees which he had collected and failed to turn into the county treasury. In the opinion the court say:

"The cause of action alleged, as we think, is one upon a liability created by statute, and should have been brought within three years after it had accrued. * * * An action accrued against the defendant for fees collected and unaccounted for at the quarterly settlement following the receipt of such fees * * * The statutory limitation could not be extended by the failure to demand the payment of the fees collected. * * The cause of action was barred on all the claims included in the petition in January, 1891, although an action on the bond for some purpose might have been brought within a later date. * * * An interpretation of this provision was before the court in Ryus vs. Gruble, 31 Kans. 767, where it was held that the wrongs committed by the defendant were the real substantial foundation for the cause of action, and that the bond was virtually only a collateral security for the enforcement of such cause of action.

"The bond does not give the cause of action; the wrongs or delicts due; and the bond simply furnishes security to indemnify the persons who suffer by reason of such wrongs or delicts; and while the statute cited by plaintiff operates to bar every action brought upon the bond to enforce a cause of action which accrued more than five years prior to the commencement of the action, yet such statute does not operate to suspend the operation of the other statutes of limitation, or to continue in force or revive a cause of action which had already been barred by some one of the other statutes of limitation. Whenever a cause is barred by any statute of limitations, the right to maintain an action therefor upon a bond which simply operates as a security for the same thing must necessarily cease to exist."

"Even if a demand had been necessary, it should have been made within a reasonable time, and there being no good reason for delay the cause of action must have accrued more than three years before its commencement."

And so we submit, in the case at bar, the warrants do not give the cause of action; the wrongs or delicts, complained of do; and while conceeding the rule that the statute of limitations does not run against an action upon a municipal warrant until there is money in the treasury etc., yet such rule does not operate to suspend the operation of other statutes of limitation or to continue in force or revive a cause of action which has been barred by some one of the other statutes of limitation.

5. *That this action not having been commenced within one year from the time the first action was dismissed, it is barred.*

The first action in mandamus having been commenced by Gray Receiver, in 1895, and dismissed by Turner and Kirkwood, on the 28th day of June, 1901, and the time limited for bringing an action having expired, this action should have been brought, under the provision of Section 23 of the Code, above set forth, within a year from the date of the dismissal of the first action, which would have been on or before the 28th day of June, 1902, but it was not brought until the 23rd day of July, 1903, more than two years after the time the gate of indulgence provided in said Section 23 had been closed against them.

6. *That all said warrants having a fixed time of payment, an action accrued on each, when payment was not made at the fixed time.*

We think that a warrant having a fixed time of payment is not subject to the same rule as those warrants having no fixed time of payment. As it was reasoned in King Iron Bridge Co. v. Otoe, supra, that whoever deals with a county and takes in payment of his demand a warrant, *no time of payment being fixed*, does so under the implied agreement that if there be no funds in the treasury out of which it can be satisfied, he will wait until the money can be raised in the ordinary mode of collecting revenues etc; if this reasoning is correct, we think it follows that where one takes a warrant with a fixed time of payment in the future, he is only required to wait until the

time fixed arrives, to resort to the courts to enforce payment, and we think he must resort to the courts within the period of the statutes of limitation after that time arrives.

In the case of Nash vs. El Dorado, 24 Fed. 252, it was held that the Statute of Limitations ran upon the coupons, sued upon, from the date of their maturity.

Se also the case of Barden vs. The City of Duluth, et al., 28 Fed. 14, wherein it said:

"Where a municipal corporation is authorized by its charter to improve streets, and to assess the costs thereof against adjacent lots, and to issue certificates showing the amount assessed against each lot; and where, by the terms of the charter, these certificates, unless paid within thirty days, are made collectible by a foreclosure action,—the Statute of Limitations begins running against each certificate at the expiration of thirty days."

IN CONCLUSION.

It may be argued that at the time the first suit in mandamus was brought all of the warrants were not due, but we think this is not material. Those having the longest time to run became due on July, 1, 1898 and if the full statutory period were allowed after that date, the action should have been commenced on the 1st day of July, 1901, or even if the five years Statute of Limitations, as for an action on a written instrument could be held to apply, then the action on the longest time warrant should have been commenced on or before the First day of July, 1903, but not having been brought until the 23rd day of July, 1903., this action, so far as all the warrants are concerned, is barred by any and all the provisions of the Limitation Statutes, which might even be suggested, to apply.

Respectfully Submitted
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IN THE

SUPREME COURT

OF THE

UNITED STATES

JOHN W. DUKE, Mayor, and WILLIAM T. WALKER, et al, COUNCILMEN of the CITY of GUTHRIE,

Plaintiffs in Error

vs

C. W. TURNER and JAMES A. KIRKWOOD

Defendants in Error.

October Term 1906

No. 178

BRIEF AND ARGUMENT ON BEHALF OF DEFENDANT IN ERROR.

FRANK DALE and
A. G. C. BIERER.
Attorneys for Defendants in Error.

THE STATE JOURNAL CO., GUTHRIE, OKLAHOMA

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BRIEF AND ARGUMENT ON BEHALF OF DEFENDANT IN ERROR.

STATEMENT OF FACTS.

The defendants in error prosecuted their action in the District Court of Logan County, Oklahoma Territory, in the nature of a mandamus to compel the Mayor and City Council of the city of Guthrie to levy taxes to pay certain indebtedness created by the several subdivisions of the present city of Guthrie.

At the opening of the Territory of Oklahoma to settlement four separate city governments were established on adjacent tracts of land, and afterwards, by authority of the legislature of the Territory, were consolidated into one city, which, since the time of such consolidation, have been known as the city of Guthrie.

Under the Act of March 2, 1889, opening Oklahoma Territory to settlement, it was provided by Congress that not more than 320 acres of land could be occupied as a townsite. In order to afford people who had congregated at the city of Guthrie an opportunity to procure town lots for the purposes of occupancy, the four seperate city governments were established, each occupying 320 acres of land.

These several city governments during their separate existence contracted various debts, and on Dec. 25, 1890, after the consolidation, the legislature of the Territory of Oklahoma passed an act entitled, "An Act for the purpose of providing for the allowance and payment of the indebtedness heretofore created by the people and cities of Guthrie, East Guthrie, West Guthrie, and Capitol Hill, now consolidated into the village of Guthrie," wherein it was provided among other things that the District Judge of Logan County should appoint three persons to act as a commission to inquire into and pass upon all claims and demands theretofore issued by the city governments mentioned in the caption of said Act; that the owners and holders of script warrants or other evidence of indebtedness theretofore issued by said city governments should present their claims to the commissioners, and if the said commissioners should find that said claims were of the character mentioned in said act, the same should be allowed and thereafter certified to the District Court for approval or disapproval, and that all claims allowed and approved by the District Judge should be certified to the Mayor and Council of the village of Guthrie, now the city of Guthrie; and such Mayor and Council were directed to is-

sue warrants upon the village and people of the village to the holders and owners of said claims, to be paid by installments in one, two, three, four and five years, and to bear interest at the rate of 6 per cent. per annum from the date of the allowance of the commission.

And it was further provided in said Act that:—

"And said mayor and council of the village of Guthrie shall levy a tax upon the property of the residents of said village to pay the warrants herein referred to, levying same upon each subdivision heretofore constituting Guthrie, East Guthrie, West Guthrie and Capitol Hill according to the amount of indebtedness created by the city councils, Mayors and School Boards, heretofore acting for and in behalf of the people resident of said cities. Each of said cities to be liable for and taxable under this act for the amount of indebtedness created by them." Wilson's Digest Laws of Oklahoma, 1903. Vol. 1. p. 260-261.

The defendants in error became, by assignment and purchase, the owners of seventeen warrants, of which the numbers, amounts, dates of issue and date when due, are set forth on page 41 of the record.

The petition for mandamus filed in the trial court was made up of seventeen separate causes of action and was so filed on the 23rd day of July, 1903. In the record the plaintiffs in error have set forth the first and last causes of action, and they appear on pages 11 to 16 inclusive.

The Judge of the District Court issued an alternative writ which, in substance, appears at pages 16 to 18 inclusive, of the record, and to this alternative writ the city answered, First, denying generally all of the material allegations of the alternative writ except that the defendants were the Mayor and Councilmen of the city of Guthrie, and that due demand had been made upon the Mayor and Council to levy a tax to pay the warrants, which facts are duly admitted, and Second, alleging that the total indebtedness of the city of Guthrie, exclusive of

the warrants sued upon, was in excess of four per cent. of the value of the taxable property within the city, and claiming exemption under the Act of Congress of June 30, 1886, being Section 4, Chapter 818, Vol. 24, U. S. Statutes at Large, page 177. For a third return and answer it was alleged that during the year 1895 one W. H. Gray, was the Receiver of the National Bank of Guthrie, which was then the owner of the warrants sued upon; that during the summer of 1895 said Gray made demand upon the then Mayor and Council of the city of Guthrie to levy a tax for the payment of the warrants; that upon their failure so to do, said Gray brought an action for mandamus in the District Court of Logan County, which action was prosecuted to the Supreme Court of the Territory, where the judgment of the trial court in said former action was reversed and the cause remanded; and that the last action was not commenced within one year after the reversal and dismissal of the former action. This answer and return will be found on pages 18 to 22 inclusive, of the record.

Upon the trial of the cause no proof was offered under the second defense set forth by the city relating to the indebtedness of said city, and after the plaintiff therein had proved the ownership of the warrants and introduced the same in evidence, the following admission appears:—

"It is admitted by the defendant, the city of Guthrie, and the defendants in this case, that prior to the time of bringing this action, no levy has been made for the payment or discharge of the sums due, as shown by the face of the warrants, and that no money is now or has been with the treasurer of the city of Guthrie, or in the treasury of The City of Guthrie, for the discharge of any of the obligations created under the terms of the warrants offered in evidence." See pages 38 and 39 of the record.

At the same time it was admitted by the plaintiff in the case that:—

"The W. H. Gray, Receiver, mentioned in the third para-

graph of defendants' answer, was the legally appointed, qualified and acting Receiver of the National Bank of Guthrie, and the successor of Harper S. Cunningham, to whom the warrants sued on and described in the Alternative Writ herein were made payable, and as such Receiver, said W. H. Gray was the holder of said warrants, and said W. H. Gray during the summer of 1895 made demand upon the then Mayor and Council of said The City of Guthrie, in said Logan County, to levy a tax for the payment of said warrants, pursuant to the provisions of Article 1, Chapter 14, of the Statutes of Oklahoma of 1890.

It is further admitted that the allegations and facts pleaded and alleged in the fourth answer or return of defendants to the Alternative Writ, are true, as therein pleaded."

It will be observed by an examination of the record, (p. 36) that the case of the Territory of Oklahoma ex rel W. H. Gray, Receiver, etc., vs. Robert Martin, Mayor, etc., was on the 28th day of June, 1901, revived in the name of C. W. Turner and James A. Kirkwood, defendants in error here; and upon page 37 it will be noticed that on the same day and after the revival of the action the same was dismissed without prejudice to a new or further action.

The trial court rendered judgment for the plaintiff upon all warrants, together with interest, from which judgment an appeal was taken to the Supreme Court of the Territory, where the judgment of the lower court was duly affirmed. The opinion by the Supreme Court will be found in the record at pages 47 to 55 inclusive.

The only question presented to the Supreme Court of the Territory and considered by such court is the one arising on the statute of limitations; the trial court as well as the Supreme Court holding that the statute of limitations could not be interposed by the city as a bar to a recovery for the reason that the officers neglected and failed to levy a tax for the payment of

the sums due, as shown by the face of the warrants, or to provide a fund for the discharge of the obligations.

At the trial of the cause and in the Supreme Court of the Territory it was contended by the plaintiffs in error here that the statute of limitations might be interposed to prevent a recovery and the only question which can be considered in this appeal under the matters set forth in the record is the correctness of the ruling of the trial court and the decision of the Supreme Court growing out of the contention of counsel for the city that the statute of limitations governs and precludes the defendants in error from a recovery. It was insisted in brief of counsel before the Supreme Court of the Territory, and we presume will be urged here, that because a suit in mandamus is in the nature of an action, the three year statute of limitations is applicable to the case at bar, and that the right to bring the action accrued at the time suit was instituted by the Receiver Gray.

It is our contention that the city of Guthrie having failed through its municipal officers to levy a tax or to create a fund for the payment of the obligation, plaintiffs in error cannot maintain as a defense the statute of limitations.

ARGUMENT.

It will be observed that the act of the legislature of the Territory of Dec. 25, 1890, provides that the Mayor and Council *shall* levy a tax upon the property of the residents of the various villages named as Guthrie, East Guthrie, West Guthrie and Capitol Hill, according to the amount of indebtedness, and that each of the cities *shall* be liable for and taxable under the act for the amount of the indebtedness created by them.

This law is in the nature of a special act for the purpose of affording relief to the various claimants whose claims should be allowed by the commission and approved by the Judge of the District Court, and no provision is made in this act for any defense of the character under consideration. That the law in question is a valid act has been settled by the decision in the case of *The Guthrie National Bank vs. The City of Guthrie*, 173 U. S., 528; and in view of our Code, Section 388, code of civil procedure, 1059, Vol. 2, Wilson's Digest, which provides that a civil action may be dismissed by the plaintiff at any time before trial without prejudice to another right of action. Turner and Kirkwood at the time of the commencement of this action in mandamus stood in the attitude of persons who theretofore had instituted no action to recover upon the warrants which they held against the city.

We contend, however, that, under the great weight of authority applicable to the case under consideration, and particularly in view of the decisions of our own Supreme Court, no error was committed by the rendition of the judgment in favor of Turner and Kirkwood, and its affirmance in the Supreme Court of our Territory.

We start out with the proposition that, in a case of this character, where the only question involved is that of the statute of limitations, the Supreme Court of the United States will accept the construction placed upon such statute by the Supre-

me Court of the Territory, even if the higher court might be of the opinion that probably the construction given by the courts of the Territory was not such as would be placed upon such statute if the matter were before the Supreme Court of the United States to be determined independently of such construction. It seems to be the settled rule of the Supreme Court of the United States that such court will follow the construction placed upon local statutes of limitations by the various state and Territorial courts.

This principle is concisely stated in *Great Western Telegraph Co. vs. Purdy*, 162 U. S., 329-339, and is as follows:—

"The limitation of actions is governed by the *lex fori*, and is controlled by the legislation of the State in which the action is brought, as construed by the highest court of that State, even if the legislative act or the judicial construction differs from that prevailing in other jurisdictions. *McElmoyle* v. *Cohen*, 13 Pet. 312; *Bauserman* v. *Blunt*, 147 U. S. 647; *Metcalf* v. *Watertown*, 153 U. S. 671; *Balkan* v. *Woodstock Iron Co.*, 154 U. S. 177."

In *Balkan vs. Woodstock Iron Co.*, 154 U. S., 177-187, it is said:—

"The conclusion of the Alabama court is assailed here on the ground that it is unsound in law. While, of course, as the statutes of the State of Alabama allow two actions in ejectment, the decree of the Supreme Court of Alabama does not constitute 'the thing adjudged' in the case before us, we think the rule under which we follow state statutes of limitation and the construction of such statutes by the state courts compels us to treat the doctrine here announced as conclusive of the present case, so far as this court is concerned. The whole subject was very fully reviewed by this court in the case of *Bauserman v. Blunt*, 147 U. S., 647."

Numerous authorities are cited in this case, and we deem it unnecessary to pursue this subject further, except to suggest that the same rule applicable to state courts with refer-

ence to statutes of limitation will, under the principle laid down in *Hornbuckle vs. Toombs,* 18 Wall. 648, apply with equal force to the decisions of the Territorial courts upon matters of this character.

Our own Supreme Court has had occasion to deal specifically with the question under consideration in the case of *Board of County Commissioners of Greer County vs. Clark & Courts,* 12 Okla. 197, and the rule is there laid down without qualification that a municipality which issues evidence of indebtedness of the character in question cannot invoke the statute of limitations without first pleading and proving that it has provided a fund for the payment of the indebtedness. Quoting from the opinion in that case:—

"In our opinion where a warrant is issued by the officers of a municipal or quasi municipal corporation, and the creditor accepts the same relying on the ordinary modes of taxation to pay said obligation, the corporation cannot be heard to say, upon an action to enforce the payment thereof, that it is barred by the statute of limitations without first pleading and proving that it has provided a fund for the payment of such indebtedness."

Applying the rule laid down in *Great Western Telegraph Co. vs. Purdy,* supra, it would seem that a decision of the Supreme Court of Oklahoma has settled the rule for this Territory upon the question under consideration, to the effect that in cases of the character here under consideration, the statute of limitations will not be permitted as a defense. We have, however, as we think, the great weight of authority in support of our contention, from numerous states dealing with this matter, and particularly the decisive authority of the Supreme Court of the United States.

The principle which estops a municipal corporation from invoking the aid of the statute of limitations rests upon the fact that such municipal corporation has been guilty of some act of

negligence which would make it inequitable, in the absence of an express statute, to permit such municipality to avail itself of that character of a defense. Under the law it was the duty of the city to make provision by appropriate levies for the payment of these warrants as the same might from time to time fall due. The statute specifically directed such levies, and the city by its own failure to perform those statutory duties ought not to be permitted to create the defense which they here seek to interpose. The courts are not inclined to favor a defense of this character, where such a defense is created by the failure upon the part of public officers to perform a statutory duty, and thereby give countenance to action upon the part of public officers in violation of a law which such officers have taken an oath to support. We call attention briefly to a number of cases other than the decisions of our own Supreme Court, which we think unequivocally support the position we are here contending for.

In *Lincoln County vs. Luning*, 133 U. S., 529, we find a case where the legislature had provided for the creation of a special fund by the debtor out of which the creditor was to be paid, and such case is clearly in point with the one we are here considering, because, while that liability was originally created by contract, as was the indebtedness of the old provisional governments of the city of Guthrie, yet by reason of default, the legislature of Nevada had undertaken to provide a method by which the indebtedness should be liquidated, passed a law providing for the registration of overdue coupons, and imposed upon the treasurer the duty of thereafter paying such coupons as the money came into his possession applicable thereto. The coupons were presented for payment and not paid, no money coming into the treasury applicable thereto. The statute of limitations was pleaded as a bar to a recovery in the action. By the general limitation of the law of the state, some of its cou-

pons were barred, but in passing on this question the court said:—

"But when payment is provided for out of a particular fund to be created by the act of the debtor, he cannot plead the limitation until he shows that the fund has been provided."

The language herein quoted is especially applicable to the case under consideration. The legislature of the Territory of Oklahoma provided how the indebtedness of the old provisional governments of the city of Guthrie should be determined and liquidated; and in the act provided that the present city of Guthrie should, through its municipal officers, levy taxes upon the different subdivisions which had created obligations, and that such levies so made should create funds for the payment of the warrants issued. This it is admitted the officers of the city of Guthrie have failed entirely to do, and now they seek to interpose their own wrongful acts and negligence as a defense, under the guise of the statute of limitations.

We think, in principle, the case of *Lincoln County vs. Luning* is also supported in *King Iron Bridge Manufacturing Co. vs. Otoe County*, 124 U. S., 459.

Robertson vs. Blaine County, 90 Fed., 63, is a case wherein it is held that a county cannot plead the statute of limitations to an action to enforce an obligation payable from a particular fund without first showing that it has provided such fund, and this case cites and follows *Lincoln County vs. Luning*, supra.

This principle, as applied to the right of municipal corporations to plead the statute of limitations, is sustained in the following cases:—

Grayson vs. *Latham*, 84 Ala. 546;
Apache County vs. *Barth*, 6 Ariz. 13;
Justices vs. *Orr*, 12 Ga. 137;

Gasquet vs. *City Schools*, 45 La. Ann. 342;
Forbes vs. *Board of County Commissioners of Grand County*, 23 Colo. 344, 47 Pac. 388.

Kansas has had occasion to pass upon this same question in a number of cases.

In *School District No. 5 vs. The First National Bank of Wabash*, 66 Pac. (Kan.) 630, quoting from the opinion:—

"Statutes of limitation give the defendant a right to resist the payment of a demand based upon some act of negligence or omission of the plaintiff. But in the case at bar the defendant would found its right to defeat the claim sued on by asserting its own negligence. It has never set the machinery of the law in motion to collect the money required to meet its obligations. It has remained since the debt was contracted in a continued state of insolvency, created by its own act. We need not do more than to quote the language of Brewer, J., in *Lincoln Co. v. Luning*, 133 U. S., 532, 10 Sup. Ct. 363, 364, 33 L. Ed. 766, 767; * * *"

To the same effect is *Miller* vs. *Haskell County*, 66 Pac. (Kan) 1084; *Hubble* vs. *South Hutchinson*, 64 Kan. 645; *Leach* vs. *Wilson County*, 62 Tex. 331.

It was insisted in the brief of counsel for the city in the Supreme Court of our Territory that because of the fact that a mandamus action had been instituted by W. H. Gray, Receiver, then holder of the warrants, in 1895, at which time the right of action had accrued, therefore the statute of limitations commenced to run at the time of the institution of such action.

We fail to see the force of this suggestion. It is true that the right of action existed in the warrant-holder prior to the time of the institution of the action now in consideration, but this fact cannot affect the right of the warrant holders to maintain the present suit provided we are right in our contention

that the statute of limitations does not begin to run until such time as the city has provided a fund for the payment of the indebtedness. As heretofore shown, our statute permits a suit to be dismissed without prejudice to a new cause of action. The suit instituted by Gray, the Receiver, was so dismissed, and the present warrant-holders stand in the attitude of persons who have never brought any action to enforce their claims, and while the right of action existed in 1895 as to some of the warrants, yet we think that such fact has no bearing upon the case under consideration, because it is immaterial how many suits may be instituted upon the same cause of action, if the right to maintain the last one so instituted is not barred by the statute of limitations.

If A. has a right of action upon a contract which is not barred by the statute of limitations for a period of ten years, and commences an action within one year after the right accrues, and if the law gives to A. the right to dismiss that action without prejudice to a new one, and A. so exercises the right given to him by the statute, and nine years after commencing the first action begins another one upon the same cause, the second action is not prejudiced by the bringing of the first, because the second one is still brought within the period of time fixed by the statute. So, too, in the present case, if the statute of limitations has no application until such time as the city has performed its duty under the law, then the right to maintain the suit exists until such time as the city has placed itself in a position where it may properly interpose the statute of limitations; and if the Supreme Court of this Territory is right in the law as announced, and the statute of limitations does not begin to run until the municipality has created a fund to pay the warrant indebtedness, it is wholly immaterial how many actions are brought in the case, for the limitation does not begin to run until the municipality has performed its duty in the first instance.

In conclusion we suggest that we are unable to distinguish this case in any manner from the case of *Lincoln County vs. Luning,* 133 U. S., 529, and we further suggest that our own Supreme Court, having followed the case of *Lincoln County vs. Luning, supra,* and this being a matter of decision upon a local statute and clearly within the principle of *Great Western Telegraph Co. vs. Purdy, supra,* we believe on principle, as well as authority, that the decision of the Supreme Court of the Territory of Oklahoma should be affirmed.

Respectfully submitted.

FRANK DALE and
A. G. C. BIERER.
Attorneys for Defendants in Error.



Supreme Court of the United States.

No. 178.—October Term, 1906.

John W. Duke, Mayor, and William T. Walker et al., Councilmen of the City of Guthrie, Plaintiffs in Error,
vs.
C. W. Turner and James A. Kirkwood.

In error to the Supreme Court of the Territory of Oklahoma.

[February 25, 1907.]

Mr. Justice Day delivered the opinion of the Court.

The original action was a proceeding in mandamus commenced in the District Court of Logan County, Oklahoma Territory, July 23, 1903, by Turner and Kirkwood against the mayor and councilmen of the city of Guthrie. The petitioners obtained a writ of mandamus in the District Court to compel the city officials, for the payment of certain warrants, to levy a tax upon the property of persons residing in the territory covered by various former "provisional governments," and known as Guthrie proper, East Guthrie, West Guthrie and Capitol Hill, now included in the city of Guthrie.

These warrants were issued in pursuance of a special act of the Territorial legislature, approved December 25, 1890. 1 Wilson's Dig. 260, 261. This act was the subject of consideration in this court, its validity was sustained and its history will be found in *Guthrie National Bank* v. *Guthrie*, 173 U. S. 528. The act is set forth in the margin of the report of that case at p. 530. The warrants sued upon are 17 in number, all bearing the date of July 1, 1893, and maturing in various years, from July 1, 1894, to July 1, 1898, inclusive. These warrants are in the following form:

"Warrant of the City of Guthrie, Oklahoma Territory.

$554.15. No. 6.

Treasurer of the City of Guthrie:

One year after date pay to the order of Harper S. Cunningham, receiver National Bank, Guthrie, the sum of five hundred and fifty-four and 15.100 dollars with interest thereon at the rate of six per centum per annum, from June 3, 1891, from any moneys which shall arise from special levy for the payment of city warrants issued under the provisions of chapter No. 14, of the Statutes of Oklahoma, providing for the payment of indebtedness of the provisional governments of the cities of Guthrie, East Guthrie, West Guthrie and Capitol Hill, upon the subdivision of Guthrie known as East Guthrie.

By the order of the City Council, July 1, 1893.

A. M. McElhinney, *Mayor.*

Attest: E. G. Milliken, *City Clerk.*"

The Supreme Court of the Territory preceded its opinion with the following statement:

"This is the third time that these warrants have been brought before this court. W. H. Gray, receiver of the National Bank of Guthrie, and successor to Harper S. Cunningham, on the 7th day of September, 1895, commenced a mandamus proceeding, identical with this, in the District Court of Logan County, for the purpose of compelling the then mayor and councilmen of the city of Guthrie to levy a tax to provide a fund for the payments of certain warrants; the district court allowed the writ, but the case was appealed to this court, and on the twelfth day of February, 1897, was reversed. [5 Okla. 188.] After this reversal nothing whatever was done by the holder of these warrants in the way of taking any steps towards collecting them for more than four years thereafter. But after the decision in the case of the *Guthrie National Bank* v. *The City of Guthrie* was rendered in the Supreme Court of the United States, [173 U. S. 528,] the holders of these warrants who had lain dormant during these years made another move. The old case of *Gray* v. *Martin and Spencer*, after it had been reversed and remanded, had been dropped from the docket, and on the 28th day of June, 1901, Turner and Kirkwood filed their motion as the successors in interest of Gray, to have the case redocketed, and also filed on the same day an application to have the case revived in their names, as the successors in interest of Gray, and on the same day they filed their motion to dismiss said action, which motion was sustained, and the case dismissed. Shortly after the dismissal of the original mandamus case Turner and Kirkwood brought suit against the city of Guthrie upon these same warrants, wherein a judgment against the city for the amount of the warrants was prayed for; they failed in this suit in the District Court and appealed to the Supreme Court, where the judgment of the lower court was affirmed. [13 Okla. 26.]

"On the twenty-third day of July, 1903, after the final decision in this court in the case of *Turner and Kirkwood* v. *The City of Guthrie*, this mandamus proceeding was commenced against the mayor and councilmen, the same being in all respects similar to and identical with the original mandamus proceeding brought by W. H. Gray, receiver, upon the same warrants in 1895. The return and answer to the alternative writ set forth the same defense as was alleged in the return to the proceedings brought by Gray, receiver, and also alleges the bar to the action of the statute of limitations. Trial was had before the court, wherein it was agreed that the allegations set forth in the fourth answer or return of the defendants to the alternative writ are true, and which show the facts substantially as above set forth. Thereupon the court rendered judgment for the plaintiffs below, and allowed a peremptory writ of mandamus against plaintiffs in error, from which judgment and final order the plaintiffs in error appeal to this court."

The Supreme Court of the Territory affirmed the judgment of the District Court upon the ground that the statute of limitations, which is also the defense made in the case upon which the decision of the appeal to this court turns, did not begin to run in favor of the municipal corporation

upon the obligation evidenced by the warrants, until the municipality had provided funds by which payment could be made.

The authorities are much in conflict as to whether a statute of limitations, without express words to that effect, governs a proceeding in mandamus as though it were an ordinary civil action. Some of the cases hold that the statute of limitations applies which would govern an ordinary action to enforce the same right.

Other cases hold that the statute of limitations does not apply as it would to ordinary civil actions, but the relator is only barred from relief where he has slept upon his rights an unreasonable time, particularly when the delay has been prejudicial to the rights of the respondent. The cases *pro* and *con* are collected in a note to section 30*b*, High Extraordinary Legal Remedies, third ed.

The question is not a new one in this court; it was under consideration in *Chapman* v. *The County of Douglas*, 107 U. S. 348. That case was a bill in equity filed September 10, 1877, to compel the county of Douglas to surrender possession of two certain tracts of land to which the county had acquired title through deed made by Chapman, March 5, 1859, or in case the county elected to retain and hold the land that it be compelled to pay the reasonable price and value thereof to the complainant. The land had been conveyed for a "poor farm." The county made a payment on the land and gave its notes, secured by mortgage, payable in one, two, three and four years. Afterwards the Supreme Court of the State decided that by the purchase of lands for such a purpose a county could not be bound to pay the purchase money at any specified time or to secure it by mortgage upon the land, but was limited to a payment in cash and to the levy of an annual tax to create a fund wherewith to pay the residue. The notes remaining unpaid, the bill was filed in equity for the purpose above stated. In considering the nature of the relief and the applicability of the statute of limitations Mr. Justice Matthews, speaking for the court (p. 355) said:

"And if in such cases a proceeding in mandamus should be considered more appropriate, and, perhaps, the only effective remedy, it also is not embraced in the statute of limitations prescribed generally for civil actions. The writ may well be refused when the relator has slept upon his rights for an unreasonable time, and especially if the delay has been prejudicial to the defendant, or to the rights of other persons, though what laches, in the assertion of a clear legal right, would be sufficient to justify a refusal of the remedy by mandamus must depend, in a great measure, on the character and circumstances of the particular case. *Chinn* v. *Trustees*, 32 Ohio St. 236; Moses on Mandamus, 190. There is no statute of limitations in Nebraska applicable to that proceeding."

It will be observed that the learned justice refers in the citation just given to *Chinn* v. *Trustees*, 32 Ohio St. 236, and Moses on Mandamus,

190. In that treatise the author gives his preference for the English rule, that the party should suffer no unreasonable delay in the opinon and discretion of the court, as more just and equitable than the rule countenanced by some of the American cases.

The case of *Chinn* v. *Trustees*, 32 Ohio St. 236, holds that under the Ohio code there is no strict limitation as to the time wherein a writ of mandamus may be obtained, and the case is directly in point, owing to the similarity of the codes of Ohio and Oklahoma.

The statute of limitation relied upon in the case at bar is the three years' limitation, contained in second paragraph, section 18, Oklahoma Code, 2 Wilson's Rev. Stats. 973, 975, as to statutory liabilities, and section 23, regulating the time for the beginning of a new action to one year after reversal or failure of a former action. These sections in article 3, "Time of Commencing Civil Actions," are as follows:

"SEC. 18. Civil actions, other than the recovery of real property, can only be brought within the following periods, after the cause of action shall have accrued, and not afterwards:

"First. Within five years, an action upon any contract, agreement or promise in writing.

"Second. Within three years, an action upon a contract not in writing, express or implied; an action upon a liability created by statute, other than a forfeiture or penalty.

* * * * * *

"SEC. 23. If any action be commenced within due time, and a judgment thereon for the plaintiff be reversed, or if the plaintiff fail in such action otherwise than upon the merits, and the time limited for the same shall have expired, the plaintiff, or, if he die and the cause of action survive, his representatives may commence a new action within one year after the reversal or failure."

The limitation to three years, said to be applicable here, is upon an action created by statute other than forfeiture or penalty, but this language is in a section limiting *civil actions* other than for the recovery of real property, and the language used in section 23 has reference to actions of like character.

The proceeding in mandamus is regulated in article 33, Oklahoma Code, 2 Wilson Revised Statutes, 1130. That the proceeding is not regarded as a civil action is shown in section 694, Code, 2 Wilson, 1131, which provides that pleadings are to be construed and may be amended in the same manner "as pleadings in a civil action," and issues joined, tried, and the proceedings had, "in the same manner as in a civil action." The Oklahoma Code (§ 687) also declares that writs of mandamus may not be issued where there is a plain and adequate remedy in the ordinary course of the law.

In *Chinn* v. *Trustees, ub. sup.*, Judge Scott, delivering the opinion of the Ohio Supreme Court, said:

"The code of civil procedure limits the time within which an action can be brought 'upon a liability created by statute, other than a forfeiture or penalty' to six years. (Sec. 14.) This provision is found in title 2 of the code, the object of which is to define and prescribe 'the time of commencing civil actions.' The civil action of the code is a substitute for all such judicial proceedings as, prior thereto, were known, either as actions at law, or suits in equity. (Sec. 3.) By section 8, the limitations of this title are expressly confined to civil actions. But proceedings in mandamus were never regarded as an action at law, or a suit in equity, and are not therefore a civil action within the meaning of the code. Mandamus is an extraordinary or supplementary remedy, which cannot be resorted to if the party has any adequate, specific remedy. The code provides for and regulates this remedy, but does not recognize it as a civil action."

This language is no less applicable to the Oklahoma code. The proceeding in mandamus is not a civil action, and therefore not within the terms of the statute of limitations.

Following, then, the rule recognized and approved in *Chapman* v. *County of Douglas, supra*, the question is, should the writ be refused because the relator has slept upon his rights for an unreasonable time, and has the delay caused prejudice to the defendant, or to the rights of other interested persons?

We perceive nothing in the record to warrant that conclusion. Gray, as receiver of the National Bank of Guthrie and successor of Cunningham, to whom the warrants were payable, on September 7, 1895, began a suit in mandamus in Logan County, Oklahoma. He prevailed in that court. The case was reversed on February 12, 1897, by the Supreme Court of the Territory, (5 Okla. 188,) and was remanded and refiled in the District Court, April 7, 1897.

The validity of the act was in controversy in the case of *Guthrie National Bank* v. *Guthrie*, and sustained in this court, April 3, 1899, (173 U. S. 528,) reversing the Supreme Court of the Territory.

On the twenty-eighth day of June, 1901, Turner and Kirkwood, as the successors in interest to Gray, having purchased the warrants, as they allege, on January 5, 1901, filed their motion to dismiss the original action, which was sustained. They then (on June 28, 1901) brought suit against the city of Guthrie for judgment upon the warrants against the city, in which they failed in the District Court, and on appeal to the Supreme Court, that court holding that the remedy, if any, was by mandamus. (13 Okla. 26.) On the 23d day of July, 1903, this mandamus proceeding was begun.

These facts do not disclose any laches in asserting their rights such as would bar the right to obtain a writ of mandamus, nor does it appear that

the municipal corporation has been in anywise prejudiced by the delay. In some form legal warfare seems to have been waged for the collection of these warrants by various holders in different courts without beneficial results until the present action.

While we do not put our decision upon the same grounds as the Supreme Court of the Territory, we think its conclusion was right, and its judgment will be

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.